TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 54.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX RELATIONE BELLE FROST.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 14, 1909.

(20970.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 246.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

VS.

THE UNITED STATES OF AMERICA EX RELATIONE BELLE FROST.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, appellant,
vs.
THE UNITED STATES OF AMERICA EX RELATIONE BELLE FROST. } No. 1804.

a Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE Belle Frost, petitioner,
vs.
JAMES RUDOLPH GARFIELD, SECRETARY OF THE Interior, respondent. } No. 49014. At law.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for mandamus. Filed December 20, 1906.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE Belle Frost, petitioner,
vs.
ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR, respondent. } At law. No. 49014.

Mandamus.

Your petitioner respectfully represents:

That she is a citizen of the United States and is a citizen, member, and resident of the Choctaw Nation in the Indian Territory, and that she is a married woman and files this petition in her own right and in respect to her sole and separate estate.

2 2. That the respondent, Ethan A. Hitchcock, is a citizen of the United States temporarily residing in the District of Columbia, and is the Secretary of the Interior, an officer of the Government of the United States.

3. That your petitioner is entitled in fee simple to the following-described land located in the Choctaw Nation in the Indian Territory.

The east half of the east half of the northwest quarter of section seven (7), township two (2) south, range five (5) east, containing forty acres (40), under the laws, treaties and facts hereinafter set out.

2 4. That by treaty between the Choctaw Nation and the United States dated September 27, 1830 (7 Stat. at L., 333), and the proclamation of the President of the United States of February 24, 1831, the United States caused "to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," which said tract of country included the land described in paragraph 3 hereof and constituted the territory embraced within the Choctaw Nation in the Indian Territory.

5. That thereafter by treaties, agreements and acts of Congress the Choctaw Nation and the Chickasaw Nation of Indians were consolidated for certain purposes therein mentioned, and that by treaty of the United States Government with the Choctaw and Chickasaw nations dated June 22, 1855 (11 Stat. at L., 611), ratified February 21, 1856, and proclaimed by the President of the United States March 4, 1856, and pursuant to an act of Congress approved May 28, 1830, the United States did thereby "forever secure and guarantee the lands embraced within the said limits (including the lands above described), to the members of the Choctaw and Chic'asaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, No part thereof shall ever
3 be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

6. That said Indians and their heirs have not become extinct and have not abandoned the said land or any part thereof; that the reversionary interest of the United States in said lands has also been otherwise terminated by the acts of Congress, treaties and agreements hereinafter referred to; and that your petitioner is a Choctaw Indian by blood and is one of the heirs of the Indians referred to in said treaty.

7. That under the provisions of various acts of Congress a Commission to the Five Civilized Tribes was created for the purpose, among other things, of allotting in severalty in fee simple to the members of the Choctaw and Chickasaw nations the lands held by said nations as above set forth; that under said acts of Congress and treaties between the United States and said Indian tribes rolls of members of the tribes were directed to be prepared by said
3 Commission under the supervision of the Secretary of the Interior, one of which acts of Congress, approved June 28, 1898 (30 Stat. at L., 495), provides that when the rolls of citizens of these tribes are fully completed, the lands belonging to said tribes shall be so allotted in severalty in fee simple to the persons so enrolled, said act also providing:

"That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be alloted to the members of said tribes so as to give to each member of these tribes so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands."

"That as soon as practicable, after the completion of said allotments, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, * * *."

8. That act of Congress approved July 1, 1902, (32 Stat. at L., 641), which was approved by the Choctaw and Chickasaw nations, also provides:

"SEC. 30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens * * * the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Choctaw and Chickasaw tribes * * * upon which allotment of land and distribution of other tribal property shall be made as herein provided."

"SEC. 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, * * * as soon as practicable after the approval by the Secretary of the Interior of his enrollment, * * * which land may be selected by each allottee so as to include his improvements."

"SEC. 12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

"SEC. 16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homstead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent."

6 "SEC. 14. When allotments as herein provided have been made to all citizens * * * the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction * * * and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes."

"SEC. 71. After the expiration of nine months after the date of the original selection of an allotment, by or for any citizen * * * of the Choctaw or Chickasaw tribes, as provided in this agreement, no contest shall be instituted against such selection."

"SEC. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

9. Petitioner further shows that she made application to
7 the Commission to the Five Civilized Tribes for enrollment as a citizen by blood of the Choctaw Nation, was duly and lawfully enrolled, which enrollment was approved by the Secretary of the Interior, and was by him placed upon the final roll of the members of said tribe in accordance with law; that at the time of the acts hereinafter mentioned your petitioner owned in her own right the improvements upon the above described land in paragraph three hereof and immediately after her enrollment as above mentioned, she was entitled to and thereafter did on, to wit, July 23, 1903, select as a part of her allotment the land described in paragraph 3 hereof, and the same was duly and lawfully allotted to her (segregation of the said land for townsite purposes having theretofore been refused by the Secretary of the Interior, and the same by him having been thrown open to allotment as hereinafter set forth); that after the expiration of nine months from said allotment a certificate to the said allotment was duly and lawfully issued and delivered to her; and that thereafter a patent for said land in accordance with the provisions of the act of Congress approved June 28, 1898, above quoted, was jointly executed by the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation under their hands and the seals of the respective nations, and was in accordance with said act about to be, and would have been delivered to her, whereupon the Secretary of the Interior refused to permit the delivery of said patent and directed the cancellation of the allotment of said land to petitioner and further directed the
8 segregation of this land for townsite purposes as an addition to the town of Mill Creek in the Choctaw Nation, the said act of the Secretary of the Interior occurring on, to wit, Octo-

ber 23, 1905, under the alleged provisions of the act of Congress approved May 31, 1900.

10. Your petitioner says that these acts of the Secretary of the Interior last above referred to, namely refusal to permit the patent to issue to petitioner and the direction to cancel petitioner's allotment, are arbitrary and without authority of law, as more particularly appears as follows:

That said last mentioned act of Congress and the preceding act of Congress and agreements between the Choctaw and Chickasaw nations and the United States provide for the reservation from allotment or segregation for townsite purposes of land occupied by citizens, in advance of the allotment of the same to said citizens, but that the Secretary of the Interior had no authority, either express or implied, to segregate petitioner's land for such or any other purpose after it was once allotted as above shown, and particularly after the expiration of nine months from the date of said allotment, and after the issuance and delivery of the certificate of allotment to petitioner, and after the execution of the patent as above set forth.

11. Petitioner further shows that said act of Congress approved May 31, 1900, and others acts of Congress and agreements between the Choctaw and Chickasaw nations and the United States, provide that the work of segregation of land for townsite purposes shall be done by a commission or commissions to be appointed as directed in said acts; that said commissions were directed to be composed of three persons, only one of which was directed to be appointed by the Secretary of the Interior; that the work of said commissions was to include, among other things, the appraisal of the value of the improvements on said lands so segregated; that the lands were to be by the commission surveyed and subdivided into lots, streets and alleys; that the sale of the lots was to be made at public auction, and that the act required the distribution of the proceeds of such sales, giving 37½ per cent thereof to the occupant or owner of the improvement, and 62½ per cent thereof to the nation. Said act of May 31, 1900, appropriates money for the payment of the commission and the costs of carrying on said work for the year ending June 30, 1901. Where only 160 acres of land is segregated for a townsite at a station on a line of railroad the Secretary of the Interior is authorized to make the segregation before allotment of the land to a member of the tribe, but he is not authorized to make any such segregation after such allotment.

Petitioner says that there is no commission in existence appointed under said acts or agreements authorized in any manner to segregate the land of petitioner for any purpose; that there is no fund out of which any commission or persons so segregating the land may lawfully be paid; that the provisions of the act of Congress approved May 31, 1900, and all other acts have been repealed in so far as they provide for the segregation of land for townsite purposes in the Choctaw Nation by the United States; that the

townsite of Mill Creek is already established and segregated, and petitioner's land had, as above shown, been allotted to her before the attempted segregation by the Secretary of the Interior.

6 12. Petitioner says that prior to February 17, 1903, a petition was duly presented to the Commission to the Five Civilized Tribes to have the land herein described segregated as an addition to the townsite of Mill Creek; that on February 17, 1903, the Commission to the Five Civilized Tribes recommended the segregation; that on, to wit, March 18, 1903, the Secretary of the Interior disapproved the recommendation of the Commission to the Five Civilized Tribes and declined to so segregate the land in question in view of the provisions of the act of Congress approved March 3, 1903; that thereafter the land was thrown open for allotment and was duly allotted to petitioner as above set forth.

13. That under the law, treaties and agreements hereinbefore set forth and the act of Congress approved March 3, 1903, petitioner is entitled to the whole of her land in fee simple, to have her restrictions on alienation removed and survey and plat said land for townsite purposes under the direction of the Secretary of the Interior, or to decline to do so at her election, and upon any sale of her land, whether sold as town lots or otherwise, to receive the whole of the proceeds thereof instead of but 37½ per cent, or to refuse to

11 sell the same or any part thereof; and that the arbitrary and unlawful act of the Secretary of the Interior in canceling her allotment, in refusing to permit the patent to her of same, and in directing the segregation of her land above described to be sold for townsite purposes as above shown, deprives petitioner of her property without due process of law, in violation of the fifth amendment to the Constitution of the United States.

14. Petitioner further says that since the selection of the allotment by her of the land described in paragraph 3 hereof, said land has greatly increased in value and is now of the value of more than $5,000.00.

Wherefore, inasmuch as the Honorable Ethan A. Hitchcock, Secretary of the Interior, has refused to deliver or permit to be delivered a patent to your petitioner for the land described in paragraph 3 hereof, and as the law provides no other adequate remedy in the premises whereby your petitioner can secure the patent aforesaid, to which she is entitled, and whereof your petitioner is now deprived, your petitioner prays:

1. That a writ of mandamus may be issued and directed to the Honorable Ethan A. Hitchcock, Secretary of the Interior, commanding him to deliver, or cause to be delivered, a patent to your petitioner to the land described in paragraph 3 of this petition.

2. For such other and further right or rights, or relief, as to the court may seem proper and the nature of your petitioner's case may require.

12 And as in duty bound your petitioner will ever pray.

BELLE FROST,
Petitioner.

KAPPLER & MERILLAT,
Att'ys for Petitioner.

7 DISTRICT OF COLUMBIA, *ss:*

Before the subscribed, a notary public in and for the District of Columbia, on the 20th day of December, A. D. 1906, personally appeared Charles H. Merillat, who made oath on the Holy Evangels of Almighty God that he is the attorney of Belle Frost, the within petitioner, and is authorized by her specially to institute these proceedings; that the facts as stated in said petition are true to the best of deponent's knowledge and belief.

CHARLES H. MERILLAT.

Subscribed and sworn to before me this 20th day of December, A. D. 1906.

JOHN R. YOUNG, *Clerk.*

Rule to show cause. Filed December 20, 1906.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE Belle Frost *vs.* ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR, respondent.	At law. No. 49014.

13 On consideration of the petition filed herein on the 20th day of December, 1906, by the United States of America ex rel. Belle Frost, it is by the court this 20th day of December, 1906, ordered that the said Ethan A. Hitchcock, Secretary of the Interior be, and he hereby is, commanded and ordered to show cause on or before the 10th day of January, 1907, why a writ of mandamus should not issue out of this court commanding him to issue or cause to be issued a patent to the land claimed by the petitioner, Belle Frost, as prayed in the petition filed in this cause.

WRIGHT, *Justice.*

Marshal's return.

Served copy of within rule on Ethan A. Hitchcock Secretary of the Interior Dec. 20, 1906.

AULICK PALMER, *Marshal.*
S.

8 *Answer of respondent. Filed January 10, 1907.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE Belle Frost *vs.* ETHAN ALLEN HITCHCOCK, SECRETARY OF THE Interior.	At law. No. 49014.

14 Ethan Allen Hitchcock, Secretary of the Interior, for answer to relator's petition herein, says:

During all times that his acts are charged or referred to in the petition he has been incumbent of the office of Secretary of the Interior, charged by sections 441 and 463 of the Revised Statutes of the United States with supervision and direction of all public affairs relating to Indians, Indian affairs, and Indian relations, and particularly with administration of the act of June 28, 1898 (30 United States Statutes at Large, 495), and acts supplementary thereto, providing, among other things, for allotment and conveyance of the communal lands of the Choctaw and Chickasaw Indian tribes in severalty to the tribal members.

It is true, as charged, that the lands in question, the east half of the east half of the northwest quarter of section seven, township two south, range five east, Indian meridian, containing forty acres, are part of the land conveyed in fee simple by patent of the United States to the Choctaw Nation, pursuant to the treaty of September 27, 1830 (7 United States Statutes at Large, 333), and became property of the Choctaw-Chickasaw nations by the act of May 28, 1830 (4 United States Statutes at Large, 411), and treaty of June 22, 1855 (11 United States Statutes at Large, 611). It is true, as charged, that the conditions for forfeiture and reversion of the title to the United States fixed by such treaties and patent have not happened, and said land is part of the tribal lands subject under said allotment acts to allotment in severalty to the tribal members, if not under such acts otherwise disposed of for benefit of such tribes
15 and their members.

It is true, as charged, that petitioner Belle Frost is a member of the Choctaw Nation, entitled to all benefit of the allotment acts, whose enrolment as a Choctaw by blood was approved by defendant, December 12, 1902.

The facts as to these particular lands are, that October 26, 1900, 155.45 acres adjoining west of, but not including, these lands, were segregated by defendant for the townsite of Bryant, now called Millcreek, under the act of May 31, 1900 (31 United States Statutes at Large, 221, 237), and subsequently, prior to February 17, 1903, urban settlement, occupancy, and improvement extended to the land in question, and the Commission to the Five Cilivized Tribes

9 that day recommended such tracts be segregated as an addition to Millcreek under said act and that of July 1, 1902 (32 United States Statutes at Large, 641), and reported that the town contained about 1,200 inhabitants, that it would probably soon have 2,000 or 3,000, and that these lands "are partially covered by residences and are much needed for townsite purposes." March 12, 1903, the Commissioner of Indian Affairs transmitted such report, concurring in such recommendation. March 18, 1903, defendant, in view of the act of March 3, 1903 (32 United States Statutes at Large, 982, 996), deemed it inadvisable to make the reservation. Thereafter, on or about July 23, 1903, the petitioner selected the land in question as part of her allotment; subsequently a certificate of allotment of said lands as part of her allotment was issued to her, and pursuant thereto a patent therefor was duly executed by the
16 principal chief of the Choctaw Nation and governor of the Chickasaw Nation, but was never approved by defendant, nor was it ever delivered to petitioner, nor recorded in the office of the Commission.

Subsequently, about March 11, 1905, defendant was advised that said land was then and from prior to its selection by petitioner had been under urban occupancy, and June 19, 1905, he ordered investigation of the conditions and facts, and finding such was the fact and that the inhabitants had expended large sums in building upon and improving said tract and were entitled to be protected, October 23, 1905, by virtue of the powers in him vested by the allotment acts, defendant segregated the land for townsite purposes, and canceled petitioner's allotment thereof, with leave to select other lands to fill her right to tribal lands in severalty. The patent that had previously been executed as aforesaid, for delivery to her, was accordingly recalled and remains on file in the office of the Commissioner of Indian Affairs to be canceled.

The acts hereinbefore referred to, upon which the rights of petitioner are derived, and the acts of defendant are predicated, so far as deemed material, are set out and annexed hereto, marked "A."

Defendant avers that petitioner's application for allotment and claim for a title to such lands in severalty to her so made and by her petition herein insisted upon rests solely upon and arises out of said treaties and acts of Congress, and came before defendant
17 as Secretary of the Interior for examination, consideration and approval in the due and regular course of administration of communal Indian tribal lands under said acts of Congress, which subject all allotments of such land in severalty to the final approval or disapproval of the Secretary of the Interior; that such acts of Congress are intended to and do vest in the Secretary of the Interior superintending and supervising power over administration of the allotment acts and allotment in severalty of the Indian communal lands, to prevent injustice or wrong to occupants thereof, and to recognize, adjust and preserve their equitable claims thereto and

equitable rights therein; that defendant, as Secretary of the Interior, examined and considered petitioner's application for allot-
10 ment of said lands in severalty to her, and all evidence and proofs presented by her or in her behalf in support thereof, including each several matter set forth in her petition herein, and proof of urban use of the land at and before her selection now in the files of the Indian Bureau and Department of the Interior, and upon such consideration defendant, as Secretary of the Interior, found, concluded, and determined that under the existing facts and the law applicable thereto, the petitioner was not and is not rightfully or justly entitled to allotment of said lands or to title in severalty thereto, but that such lands ought of right to be, as they were in fact at the time of petitioner's selection and application for allotment thereof, set apart and disposed of for urban uses, as an addition to the townsite of Millcreek, and defendant, as Secretary of the Interior, denied the application of the petitioner for allotment of them in severalty to her.

18 Having fully answered relator's petition herein filed, defendant prays that the rule herein issued to show cause why a writ of mandamus should not issue out of this court commanding defendant as Secretary of the Interior to issue or cause to be issued a patent conveying said lands to petitioner, Belle Frost, as prayed in her petition, may be discharged and the petition aforesaid be dismissed, with costs.

E. A. HITCHCOCK,
Secretary of the Interior.

F. L. CAMPBELL,
Assistant Attorney-General.
JOSEPH R. WEBSTER,
Assistant Attorney.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Ethan Allen Hitchcock, being first duly sworn, says: I am the Secretary of the Interior, and, as such, am defendant in the above-entitled proceeding, and I have read my foregoing answer, and the several matters of fact therein set forth are true as I verily believe.

E. A. HITCHCOCK.

Subscribed in my presence, and sworn to before me this 9th day of January, 1907.

[SEAL.]

W. BERTRAND ACKER,
Notary Public in and for D. C.

11

19 *Demurrer. Filed January 21, 1907.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA ex relatione Belle Frost *vs.* ETHAN ALLEN HITCHCOCK, Secretary of the Interior.	At law. No. 49014.

Now comes the relator, and says that the answer of the defendant Ethan Allen Hitchcock, Secretary of the Interior, to the petition in the above-entitled cause is bad in substance.

KAPPLER & MERILLAT,
Attorneys for Relator.

Note.

Among the points to be argued is that the answer sets forth no good and sufficient reason in law why patent should not issue to relator, and why a peremptory writ of mandamus should not issue, compelling the respondent to deliver the patent in controversy to the relator.

KAPPLER & MERILLAT,
Attorneys for Relator.

20 Supreme Court of the District of Columbia.

TUESDAY, *March 12, 1907.*

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

THE UNITED STATES OF AMERICA EX RELATIONE Belle Frost, relator, *vs.* ETHAN ALLEN HITCHCOCK, SECRETARY OF THE Interior, respondent.	At law. No. 49014.

Upon consideration of the relators demurrer to the answer of the respondent filed herein, it is ordered that said demurrer be and hereby is sustained.

12 *Opinion of the court. Filed March 12, 1907.*

THE UNITED STATES OF AMERICA ex Relatione BELLE FROST
vs.
ETHAN ALLEN HITCHCOCK, Secretary of the Interior.

Memorandum on demurrer to answer.

The court desires to make to counsel some acknowledgment of its appreciation of the degree to which its labors have been
21 lightened by the pains to which they have proceeded in transcribing and collating those portions of the various acts of Congress which pertain to the matter at bar; they have attached such exhibits as enable the court to have before it not only such facts, but also such legislative enactments as pertain, without ever turning away from the pleadings themselves.

Putting aside the rest, the ultimate facts which seem to me to control the matter, are thus—

At the time of the allotment to the petitioner, the lands were thoroughly and properly allottable to her; she duly selected them, the proper certificate of allotment was duly issued to her by the Commission, a patent therefor duly executed by the principal chief of the Choctaw Nation and governor of the Chickasaw Nation, but the delivery of the patent to her declined by the respondent. He states the reason for his declination, which is, that since the allotment and execution of the patent, he has undertaken to segregate the lands for townsite purposes.

If at the time of his action in undertaking to segregate, he was vested with the discretion or authority to segregate these lands, the propriety of his decision of the matter is not for review or question here; but if he had then no such power, there is no discretion left; nothing but the delivery of the patent, which is a mere administrative function.

The power to segregate for townsite purposes prior to allotment is clear; the act of May 31, 1900, and that of March 1, 1901, providing—
22 "Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment, to set aside and reserve from allotment any lands etc."

As to what shall be the status after allotment, the act of July 1, 1902, sec. 23, provides—

"Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein etc."

If this certificate is to be conclusive evidence, it means that the existence of the certificate settles the matter; that the action of the Commission in making the allotment, puts an end to the power of segregation which the Secretary possessed prior to allotment; that

13 the Secretary is without authority to set aside the allotment, or to segregate the lands already disposed of by the allotment; that he has no discretion in the matter but to deliver the patent to the petitioner.

Therefore the demurrer to the answer must be sustained.

W.

23 *Motion to substitute defendant. Filed May 2, 1907.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES EX REL. BELLE FROST, petitioner. *vs.* ETHAN A. HITCHCOCK, SECRETARY OF THE Interior, respondent.	Law. No. 49014.

Comes now the petitioner by her attorneys Kappler & Merillat and states to the court that since the filing of her petition in the above-entitled cause and the answer of the respondent thereto Ethan A. Hitchcock by resignation March 5, 1907, vacated the office of Secretary of the Interior and was succeeded in said office by James Rudolph Garfield, who is present incumbent thereof. Wherefore, petitioner represents that it is essential to the survival of the above-entitled cause of action, to the protection of petitioner's rights thereunder and to a settlement of the questions therein involved that said James Rudolph Garfield, Secretary of the Interior, be substituted in the stead of Ethan A. Hitchcock, formerly Secretary of the Interior, as respondent to said cause of action as in such cases made and provided by law, and petitioner prays the court accordingly so orders.

KAPPLER & MERILLAT,
Attorneys for Petitioner.

I consent:
GEORGE W. WOODRUFF.

24 *Order substituting respondent. Filed May 2, 1907.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES EX REL. BELLE FROST, petitioner. *vs.* ETHAN A. HITCHCOCK, SECRETARY OF THE Interior, respondent.	Law. No. 49014.

On motion of counsel for petitioner, counsel for respondent consenting, it is by the court this 2d day of May, 1907, ordered that James Rudolph Garfield, Secretary of the Interior, be substituted

14 as respondent to the above-entitled cause of action in place and stead of Ethan A. Hitchcock, who resigned from said office March 5, 1907.

THOS. H. ANDERSON, *Justice.*

Order authorizing amendment of petition. Filed May 2, 1907.

In the Supreme Court of the District of Columbia.

THE UNITED STATES EX REL. BELLE FROST, petitioner, *vs.* JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, respondent.	Law. No. 49014.

25 On motion of counsel for complainant, counsel for respondent consenting, it is by the court this 2d day of May, 1907, ordered that the petition filed herein by petitioner be and the same hereby is permitted to be amended by inserting after the words "the value of more than $5,000.00" the words "in excess of the value of average allottable land now subject to selection by petitioner in lieu of the land in controversy."

THOS. H. ANDERSON, *Justice.*

I consent:
GEORGE W. WOODRUFF.

Amendment of petition. Filed May 2, 1907.

In the Supreme Court of the District of Columbia.

THE UNITED STATES EX REL. BELLE FROST, petitioner, *vs.* JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, respondent.	Law. No. 49014.

By leave of court first had and obtained, counsel for respondent having consented, the petition filed herein by petitioner is hereby amended by inserting after the words "the value of more than $5,000.00" the following: "in excess of the value of average allottable land now subject to selection by petitioner in lieu of the land in controversy."

KAPPLER & MERILLAT.

15

26 *Amended and substituted answer. Filed May 2, 1907.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE Belle Frost, *vs.* JAMES RUDOLPH GARFIELD, SECRETARY OF THE Interior.	At law. No. 49014.

James Rudolph Garfield, Secretary of the Interior, successor in office to Ethan Allen Hitchcock, late incumbent, for amended and substituted answer to the amended petition herein, says:

During all times that the original defendant's acts are charged, or referred to, to March 5, 1907, not including said day, Ethan Allen Hitchcock was incumbent of the office of Secretary of the Interior, charged by sections 441 and 463 of the Revised Statutes of the United States with supervision and direction of all public affairs relating to Indians, Indian affairs, and particularly with administration of the act of June 28, 1898 (30 United States Statutes at Large, 495), and acts supplementary thereto, providing, among other things, for allotment and conveyance of the communal lands of the Choctaw and Chickasaw Indian tribes, in severalty to the tribal members.

It is true, as charged, that the lands in question—the east
27 half of the east half of the northwest quarter of section seven, township two south, range five east, Indian meridian, containing forty acres—are part of the lands conveyed in fee simple by patent of the United States to the Choctaw Nation pursuant to treaty of September 27, 1830 (7 United States Statutes at Large, 333), and became property of the Choctaw-Chickasaw nations by the act of May 28, 1830 (4 United Statutes at Large, 411), and treaty of June 22, 1855 (11 United — Statutes at Large, 611). It is true, as charged, that the condition for forfeiture and reversion of the title to the United States have not happened, and said land is part of the tribal lands subject under said acts to allotment in severalty to the tribal members, if not under such acts otherwise reserved to be disposed of for benefit of such tribes and their members. It is true, as charged, that petitioner, Belle Frost, is a member of the Choctaw Nation entitled to all benefit of the allotment acts, whose enrollment as a Choctaw by blood was approved by respondent's predecessor, December 12, 1902.

The facts as to these particular lands are that October 26, 1900, 155.45 acres adjoining west of, but not including, these lands were segregated by respondent's predecessor for the townsite of Bryant, now called Mill Creek, under the act of May 31, 1900 (31 United States Statutes at Large, 221, 237), and subsequently, prior to February 17, 1903, urban settlement, occupancy, and improve-

16 ment extended upon the lands in question, and the Commission to the Five Civilized Tribes that day recommended such tract to be segregated as an addition to Mill Creek under said
28 act and that of July 1, 1902 (32 United States Statutes at Large, 641), and reported that the town contained about 1,200 inhabitants, that it would probably soon have 2,000 or 3,000, and that these lands "are partially covered by residences and are much needed for townsite purposes." March 12, 1903, the Commissioner of Indian Affairs concurred in such recommendation. March 18, 1903, respondent's predecessor, in view of the act of March 3, 1903, (32 United States Statutes at Large, 982, 996), deemed it inadvisable to make the reservation. Thereafter, on or about July 23, 1903, the petitioner selected the lands described, as part of her allotment, and subsequently a certificate of allotment thereof to her as part of her allotment was issued to her by the Commissioner, but the allotment of the lands to petitioner by the Commissioner was never reported to the Secretary of the Interior for his approval, nor was such allotment ever approved by him.

Pursuant to the allotment certificate, so issued, a patent for the described lands was duly executed by the tribal executives,—the principal chief of the Choctaw Nation and governor of the Chickasaw Nation—but it was never approved by respondent's predecessor, or by respondent, nor was it ever delivered to petitioner, nor recorded in the office of the commission.

After issue of the allotment certificate, about March 11, 1905, respondent's predecessor was advised that said land was then and from prior to its selection by petitioner had been under urban occupancy and June 19, 1905, he ordered investigation, and
29 finding such was the fact and that the inhabitants of the tract had expended large sums in building upon and improving it prior to petitioner's selection of it, and were entitled to be protected, October 23, 1905, by virtue of the powers in him vested by the allotment acts, respondent's predecessor segregated the lands for townsite purposes and canceled petitioner's allotment thereof, with leave to select other lands to fill her allotment right to tribal lands in severalty, and the patent previously executed by said tribal executives for delivery to her was by him recalled and remains, unapproved, on file in the office of the Commissioner of Indian Affairs to be canceled.

Respondent admits that it is true that said lands selected by petitioner are of greater value than the sum of five thousand dollars in excess of the value of an equal area of average allotable land now, or on or at any time since October 23, 1905, subject to selection by petitioner in lieu of the land by her so selected, and now in controversy.

The acts of Congress, hereinbefore referred to, under which petitioner's rights are derived, and the acts of respondent's predecessor were predicated, so far as are deemed material, are set out and annexed hereto, marked A.

Respondent avers that petitioner's application for allotment
17 and claim for a title to such lands in severalty to her so made and by her petition herein insisted upon, rests solely upon and arises out of said treaties and acts of Congress, and came
30 before respondent's predecessor as Secretary of the Interior for examination, consideration and approval in the due and regular course of administration of communal Indian tribal lands under said acts of Congress, which subject all allotments of such land in severalty to the final approval or disapproval of the Secretary of the Interior; that such acts of Congress are intended to and do vest in the Secretary of the Interior superintending and supervising power over administration of the allotment acts and allotment in severalty of the Indian communal lands, to prevent injustice or wrong to occupants thereof, and to recognize, adjust and preserve their equitable claims thereto and equitable rights therein; that respondent's predecessor as Secretary of the Interior examined and considered petitioner's application for allotment of said lands in severalty to her, and all evidence and proofs presented by her or in her behalf in support thereof, including each several matter set forth in her petition herein, and proof of urban use of the land at and before her selection now in the files of the Indian Bureau and Department of the Interior, and upon such consideration respondent's predecessor as Secretary of the Interior found, concluded, and determined that under the existing facts and the law applicable thereto, the petitioner was not and is not rightfully or justly entitled to allotment of said lands or to title in severalty thereto, but that such lands ought of right to be, as they were in law and fact at the time of petitioner's selection and application for allotment thereof, set apart and disposed of for urban uses, as an addition to the townsite of Mill
31 Creek, and respondent's predecessor as Secretary of the Interior denied the application of the petitioner for allotment of them in severalty to her.

Having fully answered relator's petition herein filed, defendant prays that the rule herein issued to show cause why a writ of mandamus should not issue out of this court commanding respondent, the Secretary of the Interior, to issue or cause to be issued a patent conveying said lands to the petitioner, Belle Frost, as prayed in her petition, may be discharged and the petition aforesaid be dismissed, with costs.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.

G. W. WOODRUFF,
Assistant Attorney-General.
JOSEPH R. WEBSTER,
Assistant Attorney.

UNITED STATES OF AMERICA, *District of Columbia*, *ss:*

James Rudolph Garfield, being first duly sworn, says: I am the Secretary of the Interior, and, as such, am respondent in the
18 above-entitled proceeding, as successor to Ethan Allen Hitchcock, late incumbent, and I have read my foregoing amended and substituted answer, and the several matters of fact therein set forth are true as I verily believe.

JAMES RUDOLPH GARFIELD.

Subscribed in my presence, and sworn to before me
32 this — day of March, 1907.

——— ———.

EXHIBIT "A."

Act of June 28, 1898 (30 Stat., 495, 505).

SEC. 29. * * * That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

(Ib. 507). That as soon as practicable, after the completion of said allotments, the principal chief of the Choctaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in accordance with the requirements of this agreement * * *

(Ib. 508). Town sites. * * * When said towns are so laid out, each lot on which permanent, substantial, and valuable improvements, other than tillage and temporary houses, have been made, shall be valued by the commission, * * * The owner of the improvements on each lot shall have the right to buy one residence and one business lot, at fifty per centum of the appraised value
33 of such improved property * * * (A Re-enacted March 1, 1901, 31 Stat., 866, secs. 12 & 13.)

Act of May 31, 1900 (31 Stat., 221, 236).

The Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee nations as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns, * * * (A Re-enacted March 1, 1901, 31 Stat., 864.)

(Ib. 237). Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the

Choctaw, Chickasaw, Creek or Cherokee nation a separate townsite commission for any town, * * * (A supra.)

(Ib. 238). The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the
19 authorities of any town in any of said nations, at the expense of the town, to survey, lay out and plat the site thereof, subject to his supervision and approval as in other instances * * * (A.)

It shall not be required that the townsite limits established in the course of the platting and disposing of town lots and the cor-
34 porate limits of the town, if incorporated, shall be identical or co-extensive, but such townsite limits and corporate limits shall be so established as to best subserve the present needs and reasonable prospective growth of the town, as the same shall appear at the time when such limits are respectively established: * * * (A.)

Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek or Cherokee nations, not exceeding 160 acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such townsite at the time * * * Whenever any tract of land shall be set aside as herein provided, which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior. (A.)

Act of March 1, 1901 (31 Stat., 861, 864), under the head of townsites, re-enacted the provisions of the act of May 31, 1900 (21 Stat., 236), and of June 28, 1898, above set out marked (A), which are here referred to without repetition.

The act of July 1, 1902 (32 Stat., 641).

SEC. 11. There shall be allotted to each member of the
35 Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, * * * as soon as practicable after the approval by the Secretary of the Interior of his enrollment, * * * which land may be selected by each allottee so as to include his improvements.

SEC. 12. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of

allotment, and separate certificate and patent shall issue for said homestead.

SEC. 14. When allotments as herein provided have been made to all citizens * * * the residue of lands not herein reserved or
20 otherwise disposed of, if any there be, shall be sold at public auction * * * and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes.

SEC. 16. All lands allotted to the members of said tribes,
36 except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent.

SEC. 23. Allotment of certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land.

SEC. 26. The following lands shall be reserved from the allotment of lands herein provided for: (a) All lands set apart for townsites either by terms of the Atoka agreement, the act of Congress of May 31, 1900 (supra, 31 Stat., 236–7), as herein assented to, or by the terms of this agreement: * * *

SEC. 45. The Choctaw and Chickasaw tribes hereby assent to the act of Congress approved May 31, 1900 (31 Stat., 221)
37 (supra), in so far as it pertains to townsites in the Choctaw and Chickasaw nations, ratifying and confirming all acts of the Government of the United States thereunder and consent to the continuance of the provisions of said act not in conflict with this agreement.

SEC. 46. As to those townsites heretofore set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, as provided in said act of Congress of May 31, 1900, such additional acreage may be added thereto, in like manner as the original townsite was set apart, as may be necessary for the present needs and reasonable prospective growth of said towns * * * not to exceed 640 acres for each townsite.

SEC. 47. The lands which may hereafter be set aside and reserved for townsites upon the recommendation of the Commission to the

Five Civilized Tribes, under the provisions of said act of May 31, 1900, shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such townsites, not to exceed 640 acres for each townsite.

SEC. 48. Whenever any tract of land shall be set aside for townsite purposes as provided in said act of May 31, 1900, or by the
21 terms of this agreement, which is occupied by any member of the Choctaw or Chickasaw nations, such occupant shall be fully compensated for his improvements thereon, out of the funds of the tribes arising from the sale of town lots * * *

38 SEC. 66. All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations, in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land titles as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records.

SEC. 71. After the expiration of nine months after the date of the original selection of an allotment, by or for any citizen * * * of the Choctaw or Chickasaw tribes, as provided in this agreement, no contest shall be instituted against such selection.

The act of March 3, 1903 (32 Stat., 982, 996), appropriated $25,000 to pay townsite expenses among the Five Civilized Tribes, but provided:

That the money hereby appropriated shall be applied only to the expenses incident to the survey, platting, and appraisement of townsites hereby set aside and reserved from allotment: And provided further, That nothing herein contained shall prevent the survey and platting, at their own expense, of townsites by private parties, where stations are located along the lines of railways, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior.

39 *Demurrer to amended answer. Filed May 2, 1907.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE Belle Frost, petitioner, *vs.* JAMES RUDOLPH GARFIELD, SECRETARY OF THE Interior, respondent.	Law. No. 49014.

The petitioner says that the answer of the respondent filed herein on the 2d day of May, 1907, is bad in substance.

KAPPLER & MERILLAT,
Attorneys for Petitioner.

Note.

The petitioner states that the answer shows that the Secretary of the Interior is without authority in law to refuse to issue to her the patent demanded by her of the respondent and this is one matter to be argued on demurrer.

22 Endorsed: The phraseology of the original and amended answers "deem it inadvisable to make the reservation" does not seem to disclose that the respondent had affirmatively declined and refused to adopt the recommendation of the commission for segregation; but the averment of the petition is distinct upon the

40 point, and therefore admitted by the silence of the answer. I see no escape from the conclusion that after the allotment, the respondent was without authority to segregate. The demurrer is sustained. Wright.

Supreme Court of the District of Columbia.

MONDAY, *May 20, 1907.*

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

THE UNITED STATES OF AMERICA EX REL. Belle Frost, relator, *vs.* JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, respondent.	At law. No. 49014.

Come now here as well the relator, as the respondent, by their respective attorneys; whereupon the relators demurrer to the answer of the respondent having been sustained on the 13th day of May, 1907, the respondent by its attorney, George W. Woodruff, says he will stand upon his answer as heretofore filed.

Thereupon, the court being fully advised, it is considered, ordered and adjudged that the respondent, James Rudolph Garfield, be, and he is hereby, commanded within twenty days after this date to issue or cause to be issued to the relator, Belle Frost, the patent

41 executed by the principal chief of the Choctaw Nation and governor of the Chickasaw Nation, conveying to her all the right, title, and interest of the Choctaw-Chickasaw nations in and to the east half of the east half of the northwest quarter of section seven, in township two south, range five east, Indian meridian, upon the certificate of allotment thereof in severalty heretofore issued to her by the Commissioner to the Five Civilized Tribes.

The respondent thereupon in open court by counsel excepted to the judgment so rendered and prayed an appeal from the judgment of this court to the Court of Appeals of the District of Columbia, and pending such an appeal, the judgment is stayed and no writ shall run out thereon against the respondent.

23 *Stipulation as to record. Filed May 31, 1907.*

In the Supreme Court of the District of Columbia.

THE UNITED STATES ex Rel. BELLE FROST, petitioner, *vs.* JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, respondent.	Law. No. 49014.

It is stipulated that the transcript on appeal herein shall be constituted of the following parts of the original proceeding,
42 viz:

1. The petition for mandamus filed December 20, 1906, and the rule to show cause issued thereon.
2. Answer of the defendant Ethan A. Hitchcock, omitting exhibits.
3. Demurrer.
4. Order sustaining demurrer.
5. Opinion of the court.
6. Amendment of petition as to value.
7. Amendment of petition by order substituting James R. Garfield as respondent.
8. Amended and substituted answer of James Rudolph Garfield, Secretary of the Interior.
9. Demurrer to answer.
10. Order directing writ of mandamus to issue and allowing appeal.

J. R. WEBSTER,
Assistant Att'y, Att'y for Defendant.
C. H. MERILLAT,
Att'y for Petitioner.

43 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing pages numbered from 1 to 42, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49014, At Law, wherein the United States of America, ex relatione, Belle Frost, is petitioner, and James Rudolph Garfield, Secretary of the Interior, is respondent, as the same remains upon the files and of record in said court.
24 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 6th day of July, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

(Endorsed on cover:) District of Columbia Supreme Court. No. 1804. James Rudolph Garfield, Secretary of the Interior, appellant, vs. The United States of America ex relatione Belle Frost. Court of Appeals, District of Columbia. Filed Jul- 6, 1907. Henry W. Hodges, clerk.

25 Addition to record per stipulation of counsel.

Court of Appeals of the District of Columbia.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, appellant, *vs.* THE UNITED STATES OF AMERICA ex relatione Belle Frost.	No. 1804. October term, 1907.

Filed October 29, 1907.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, appellant, *vs.* THE UNITED STATES OF AMERICA EX RELATIONE BELLE Frost.	No. 1801.

It is hereby stipulated by the parties hereto that the following letter of the Secretary of the Interior shall be printed and considered as a part of the record in this case as an exhibit to appellee's petition for writ of mandamus.

CHAS. H. MERILLAT,
Att'y for Appellee.
J. R. WEBSTER,
For Resp'd't.

26 I. T. D. 1766–02.
L. R. S.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., March 18, 1903.

Commission to the Five Civilized Tribes, Muskogee, Indian Territory.

GENTLEMEN: October 26, 1900, the Department, in accordance with the provisions of the act of May 31, 1900 (31 Stats., 221) segregated for town site purposes certain tracts containing an area of 155.45 acres at Mill Creek, Chickasaw Nation.

February 17, 1903, you recommended that there be set aside and reserved from allotment additional land, amounting to 98.77 acres, for the town site at this place, in accordance with the provisions of the act of July 1, 1902 (32 Stats., 641).

March 12, 1903, the Acting Commissioner of Indian Affairs transmitted your report and concurred in your recommendation.

The Department does not deem it advisable to make the reservation in view of the act of March 3, 1903 (Public 144), which provides that the $25,000 appropriated therein to pay all expenses incident to the survey, platting and appraisement of town sites in the Choctaw, Chickasaw, Creek and Cherokee nations as required by sections 15 and 29 of the act of June 28, 1898 (30 Stats., 495) and acts amendatory thereof and supplemental thereto, "shall be applied only to the expenses incident to the survey, platting and appraisement of the town sites heretofore set aside and reserved from allotment: Provided further, That nothing herein contained shall prevent the survey and platting at their own expense of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes when recommended by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior."

A copy of the Acting Commissioner's letter is enclosed.

Respectfully,

(Signed) THOS. RYAN,
Acting Secretary.

(Endorsed:) No. 1804. James Rudolph Garfield, Secretary of the Interior, appellant, *versus* The United States of America ex relatione Belle Frost. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Oct. 29, 1907. Henry W. Hodges, clerk.

27 TUESDAY, *October 29th, A. D. 1907.*

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, appellant. *vs.* THE UNITED STATES OF AMERICA EX RELATIONE BELLE FROST.	No. 1804.

The argument in the above-entitled cause was commenced by Mr. J. R. Webster, attorney for the appellant, and was continued by Mr. C. H. Merillat, attorney for the appellee, and was concluded by Mr. George W. Woodruff, attorney for the appellant.

28 In the Court of Appeals of the District of Columbia.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, appellant. *vs.* THE UNITED STATES OF AMERICA EX REL. BELLE FROST, appellee.	No. 1804.

Stipulation.

It is hereby stipulated by the parties hereto that the above-entitled cause is submitted on the printed record and briefs and the argument heretofore made to the chief justice and Justice Clabaugh,

the justices who sat in the hearing of said cause, exclusive of th late Associate Justice McComas: Provided, however, That if th remaining justices should be divided in opinion, that the cause shal not be affirmed by a divided court, but shall be assigned for reargu ment.

GEORGE W. WOODRUFF,
Attorney for Appellant.
KAPPLER & MERILLAT,
Per CHAS. H. MERILLAT,
Attorneys for Appellee.

(Endorsed:) No. 1804. James Rudolph Garfield, &c., appellant vs. The U. S. ex rel. Belle Frost. Stipulation to submit on record and briefs to the chief justice and Justice Clabaugh. Court of Appeals, District of Columbia. Filed Nov. 18, 1907. Henry W. Hodges, clerk.

29 JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, appellant,
vs.
THE UNITED STATES OF AMERICA EX RELATIONE BELLE FROST. } No. 1804.

Opinion.

Mr. Chief Justice Shepard delivered the opinion of the court:

Relator filed her petition in the Supreme Court of the District of Columbia, against Ethan Allen Hitchcock, then Secretary of the Interior, praying a writ of mandamus ordering him to deliver to her a certain patent of 40 acres of land, part of the lands of the Choctaw and Chickasaw Indians, in the Indian Territory, that had been executed to her by the principal chief of the Choctaw Nation, and the governor of the Chickasaw Nation, and was withheld from her by the Secretary. Secretary Hitchcock made answer by way of return to the preliminary order, but retired from office while the litigation depended, and his successor, James R. Garfield, was, by order, made party respondent in his stead. The case was submitted upon demurrer to the answer. This was sustained, and, the respondent electing not to amend, a final order was entered, from which this appeal has been prosecuted, directing the writ to issue as prayed.

The determination of the correctness of this order depends upon the effect of certain acts of Congress providing for and regulating the allotment and disposition of the lands of the Choctaw and Chickasaw Indians, in the Indian Territory.

These acts are voluminous, and as, in the main, their purport is not disputed, we will state such of their requirements as are pertinent to the facts which clearly appear in the admissions of the answer to the petition and the demurrer to that answer.

Section 29 of the act approved June 28, 1898 (30 Stat., 495, 505, et seq.), declares that the lands belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes in fair and equal proportion, as afterwards specified, exempting therefrom all town sites (and some other lands not important to mention here) and providing that the appraisement and allotment shall be made under the direction of the Secretary of the Interior. It further provides that as soon as practicable after the completion of the said allotments the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations and deliver to the allottees, patents conveying to them all the right, title, and interest of the said Indians in and to the lands which shall have been allotted in accordance with the requirements of the agreement contained in the act.

This act also made a regulation as to allowances for improvements and purchase of lots by occupants in the town sites that had been reserved when laid out, etc.

The act of May 31, 1900, 31 Stat., 221, et seq., authorized the Secretary of the Interior, under rules and regulations to be prescribed by him, to lay out, survey, and plat the sites of such towns as then had a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns; and he was empowered to appoint a separate town site commission for any town. He was also empowered to permit the authorities of any town, at their own expense, to survey, lay out and plat the site thereof. It was further provided that he might, upon the recommendation of the Commission to the Five Civilized Tribes, at any time before allotment, set aside and reserve from allotment, not exceeding 160 acres in any one tract at such stations as are or shall be established in conformity with law on the line of any railway which shall be constructed, or in process of construction, in or through either of said nations prior to the allotment of the lands therein. If such land be occupied by a member of the tribe, compensation shall be made to each member under rules and regulations to be prescribed by the Secretary. These town site provisions and those of the act of 1898 were also incorporated into the act of March 1, 1901 (31 Stat., 861, et seq.).

The land in controversy adjoins the town site of Mill Creek, in which there is a railway station, which was designated and laid out October 26, 1900, and contains 155.45 acres.

In this connection, it is convenient to the understanding of the appellant's case to state a further provision relating to town sites contained in the last acts that are to be further considered. Section 46 of the act of July 1, 1902 (32 Stat., 641, et seq.), declare that as to town sites hereafter set aside on the recommendation of the Commission to the Five Civilized Tribes, as provided in the act of May 31, 1900, such additional acreage may be added thereto, in like manner as the original town site had been set apart, as may be necessary for

the present needs and reasonable prospective growth of said towns, not to exceed 640 acres. Section 47 is an additional provision to the same effect. Section 48 provides for compensation, to any member of the tribe occupying such land, for improvements.

The Appropriation Act of March 3, 1903 (32 Stat., 982, 996), appropriated $25,000 to pay town site expenses with the proviso: "That the money hereby appropriated shall be applied only to the expenses incident to the survey, platting, and appraisement of town sites heretofore set aside and reserved from allotment: *And provided further*, That nothing herein contained shall prevent the survey and platting at their own expense of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior.

For a long period of time relator had been living upon the land adjacent to Mill Creek town site, having improvements thereon. It appears from the answer of the Secretary that after Mill Creek town site had been laid off, as aforesaid, and prior to May 17, 1903, urban setlement had extended to the adjacent lands: and on that day the Commission to the Five Civilized Tribes made a recommendation to the Secretary that this adjacent land be segregated as an addition to Mill Creek under the provisions of the act of July 1, 1902 (before mentioned). They reported that the town was rapidly growing, that the adjacent lands were occupied by residences, and much needed for town site purposes. This recommendation having been approved by the Commissioner of Indian Affairs, was by him transmitted in due course to the Secretary of the Interior. With this recommendation before him the Secretary on March 18, 1903, addressed a letter to the commission, reciting the segregation of Mill Creek town site on October 26, 1900, and the recommendation of the commission approved by the Commissioner of Indian Affairs, and said: "The Department does not deem it advisable to make the recommendation in view of the act of March 3, 1903," which provides that the $25,000 appropriated thereby be applied to the expense incident to the survey of town sites heretofore set aside under sections 15 and 29 of the act of June 28, 1898, and acts supplemental thereto. The provisions of the act of March 3, 1903, which permits the platting of additions to town sites by private parties at their own expense, is copied in the letter. No further action was recommended or taken in respect of this desired addition to Mill Creek.

We return now to the provisions of the act of July 1, 1902 (32 Stat., 641, et seq.), relating to the completion of allotments on which, in addition to those of former acts before recited, the case of the relator rests. Section 11 of that act declared that there shall be allotted to each member of the Choctaw and Chickasaw Tribes, as soon as practical after the approval by the Secretary of the Interior of his enrollment, land equal in value to 320 acres of the average allottable lands of said tribes, which may be selected by each allottee

so as to include his improvements. Another section provides that no certificate shall issue until after nine months from application, during which time contests may be made. On account of their importance sections 23 and 24 are recited in full, as follows:

"Sec. 23. Allotment of certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian Agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"Sec. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land."

Section 66 provides that all patents, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes in books appropriate for that purpose, until such time as Congress may make further provision and without expense to the grantees. These records are given the same effect as other public records. Section 71 reads as follows: "Sec. 71. After the expiration of nine months after the date of the original selection of allotment by or for any citizen . . . of the Choctaw or Chickasaw Tribes, as provided for in this agreement, no contest shall be instituted against such selection." The last act relating to the subject, approved April 26, 1906 (33 Stat., 137), provides for the final closing of the rolls on or before March 4, 1907. Section 5 of the same declares that all patents to allottees shall be recorded in the office of the commission, "and when so recorded shall convey legal title and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same." Other sections provide for the removal of the principal chiefs who shall refuse or neglect to execute patents and the approval of such patents without execution by them.

31 It is admitted that relator was a Chickasaw Indian; that she was and had been living for a considerable period in her house on the land in controversy; that she was regularly enrolled as a member of the Chickasaw Tribe, entitled to participate in the allotment of the lands in accordance with the provisions of the acts aforesaid; and that her enrollment had been duly approved by the Secretary of the Interior. It was further admitted that on July 23, 1903, relator selected the land in controversy, containing her improvements, as her allotment. This was received by the commission, and nine months thereafter—there having been no contest of her right to the designated allotment—a certificate of allotment was issued and delivered to her. Thereafter the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation jointly executed a patent under the seal of their respective nations, conveying to her the title of said nations in and to said forty acres of land. It does not

appear what were the rules and regulations of the Secretary of the Interior respecting the proceedings of the commission in the matter of administering the laws relating to the Indians' lands; but it is conceded that the procedure respecting relator's allotment was in general accordance therewith. After the execution of the patent, and before registration and delivery, the Secretary ordered the same to be transmitted to him. He has refused to deliver it and has stated his intention to cancel it and admit relator to make another selection in lieu thereof.

The Secretary, claiming a general power of supervision of the administration of these Indian lands, states the reasons for withholding and canceling this patent substantially as follows: About March 11, 1905, the Secretary was advised that the land contiguous to Mill Creek town site, including relator's allotment, had been under what is called "urban occupancy;" meaning thereby that town settlers had established themselves in houses thereon from time to time. It is not claimed that these settlers were members of the said tribes. On June 19, 1905, he caused this report to be investigated, and it appeared that there were such settlers occupying valuable improvements. October 23, 1905, he ordered the lands segregated as an addition to the town site, and the cancellation of relator's patent, with permission to her to make selection of other lands. This was done in recognition of, and for the protection of the equitable rights of the aforesaid occupants.

The Secretary claims that he is vested with these powers, under his interpretation of the statutes relating to the Indians' lands; and that such interpretation involves the exercises of discretion, and is therefore beyond the power of the courts to control.

The contention of the relator is, that her allotment having been made, and her patent executed by the proper authorities provided by law, the Secretary of the Interior was invested with no power to withhold her patent, and it was his plain duty to deliver it to her.

We regard it as unnecessary to review the many decisions relating to mandamus against a public officer, that have been cited on the argument. The law, as said by Mr. Justice Peckham, "is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty." Roberts v. United States, 176 U. S., 221, 229.

In this case, there were no facts necessary to be *be* ascertained by the Secretary in the performance of his duties. With his approval, the relator had been enrolled as a member of the tribe entitled to an allotment of land. All the steps under the law and his regulations prescribing the procedure in accordance therewith, had been taken with due regularity and ended in the execution of the patent by the persons charged with that duty. This patent, passing into the pos-

session of the Secretary, has been withheld by him with the declared intention to cancel it, and segregate the lands embraced in it, to be laid out as an addition to the railway town-site of Mill Creek, upon the assumption that such power had been conferred on him by the several statutes relating to the allotment of the Choctaw and Chic'asaw Indian lands. It is not contended that power to that end has been *been* expressly conferred by the statutes, but is claimed under his construction of them; and that the necessary construction of the statutes in the performance of his duty required the exercise of judgment and discretion.

Undoubtedly there are many cases, in which, when a public officer is called upon to perform an official act as a duty, the interpretation of statutory provisions relating thereto would require the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. U. S. ex rel. Dunlap, v. Black, 128 U. S., 40, and cases therein cited and discussed.

The particular decision which, in that case, the court refused to control by mandamus, was one that had been made by the Commissioner of Pensions upon an application by a pensioner for an increase. He had to determine the right by the construction of some confusing provisions of different acts that had been passed from time to time relating to the increase of pensions upon many grounds. He had not only to construe the meaning of particular provisions, but the effect also of later acts upon the former ones. This was held to require something more than the performance of a mere ministerial duty. The broad proposition, that because courts are vested with no special appellate power in such cases, they will not interfere by mandamus with executive officers in the performance of their official duties in any case where those duties require an interpretation of the law, has been expressly denied in the recent case of Roberts v. United States, 176 U. S., 221, 231.

It was said in that case: "Every statute to some extent requires construction by the public officer, whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it in order to form a judgment from its language as to what duty he is directed by the statute to perform. But
32 that does not necessarily and in all cases make the duty of the officer any other than a ministerial act. If the law direct him to perform an act, in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and, therefore, it was not ministerial, and the court would on that account be power-

less to give relief. Such a limitation of the powers of the court, we think, would be most important, as it would relieve from judicial supervision all executive officers in the performance of their duties whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plainly they violated their duty in refusing to perform the act required."

In the light of the foregoing doctrine, we are of the opinion that the Secretary's decision in respect of his powers, under the admitted facts of this case, did not require the exercise of judgment to such an extent as to place his action beyond the control of the court by mandamus. There were several statutes relating to the allotment of the Indian lands, and the reservation of town sites, but there was no conflict between them, and no confusion in their application. Later acts expressly reenacted the provisions of former ones that are relevant to the facts presented. As a matter of fact, there was no occasion to construe these acts at all in order to perform the final act demanded of the Secretary, namely, the delivery of the patent. In so far as the relator's rights are involved, all the requirements of the statute have been fully and regularly performed. Whatever power of direction, supervision, or approval has been conferred upon the Secretary in respect of the allotment of the Indian lands, making regulations therefor, and the reservation of town sites, had been completely exhausted, so far as the relator's allotment was concerned. His official duties had been performed. It is admitted that he had approved the relator's enrollment as a member of the tribe entitled to an allotment of land; that she was in possession of the land selected by her, and made her application to the proper tribunal in regular form; and that after the expiration of the nine months permitted for contest of her application—none having been made—she had received her certificate of allotment. The statute made this certificate conclusive evidence of her right to the land, entitled her to have the Indian agent remove all persons therefrom that were objectionable to her, and declared that his acts in so doing shall not be controlled by the process of any court. Relator's right to the land became vested, and the execution and delivery of the patent—the evidence of her legal title—were ministerial acts. Barney v. Dolph, 97 U. S., 652; Simmons v. Wagner, 101 U. S., 260, 261; United States v. Detroit Lumber Co., 200 U. S., 321, 375.

The patent to which relator was entitled under the certificate of allotment was in fact executed by the parties charged with that duty by express terms of the statute. This patent passed into the hands of the Secretary, whose duty was to deliver it to the relator, as the statute conferred no power upon him to review the acts of the commission or to set aside the patent. U. S. v. Schurz, 101 U. S., 378, 395; West v. Hitchcock, 19 App. D. C., 333, 344—

The contention, then, in support of the right to recall and vacate the patent and the certificate of allotment is reduced substantially to this: Under his construction of the statutes the Secretary holds that

the certificate and patent are not conclusive; and that his authority to segregate the land embraced therein as an addition to the Mill Creek town site remains unimpaired thereby. Undoubtedly the statutes had authorized the Secretary to set aside land for town sites, and he had repeatedly so done. The town site of Mill Creek was laid out and set apart as one of those along railway lines constructed or in process of construction. It is unimportant to consider the power of the Secretary of his own motion to make additions to the town site, as it is not pretended that he had exercised any such power. The act of March 31, 1900, heretofore recited, authorized the Commissioner to the Five Civilized Tribes to recommend the reservation of additions to such town sites as Mill Creek, and this might be done "at any time before allotment." Before allotment such a recommendation was made and transmitted to the Secretary. Had he given it his approval no selection of the land would have been entertained and no allotment of it could have been made. Instead of approving he disapproved the recommendation, thereby ending its efficacy. Grant that, as indicated in his notice of disapproval, private parties interested in the extension of the town site might have procured from the Secretary an order for the reservation and the incorporation of the additional lands before their allotment; but no action was taken by them. Some time after this disapproval and the failure of action by private parties the relator selected the land as she had the right to do. Her selection and application depended before the Commission for the nine months provided for objections to, and contest of the right to the certificate of allotment. Throughout this period no reservation of the land for a town site was recommended or applied for, and there was no contest of the relator's right. The certificate, declared by the statute conclusive evidence of the passage of the tribal right, was regularly issued, and the patent followed.

Afterwards the Secretary concluded that the recommendation for additional town sites ought to have been approved and the land reserved as an extension, in the interest of the town and the "urban occupants;" and from a natural desire to protect what he conceived to be the equitable rights of these occupants, he has examined the statutes, and from their construction decided that he has the power to cancel the patent and allotment, and thereafter convert the land into a town site.

In our opinion, the statutes are plain, and admit of no room for construction. Believing that the Secretary's power in the premises ended with the issue of the certificate of allotment, and the patent, we think that he has no power to hold the patent for cancellation, and that it is his plain duty to deliver it to the relator.

The judgment will therefore be affirmed with costs. It is so ordered.

Affirmed.

33 FRIDAY, *November 29th, A. D., 1907.*

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, appellant, *vs.* THE UNITED STATES OF AMERICA, EX relatione Belle Frost.	No. 1804. October term 1907.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court, in this cause be, and the same is hereby, affirmed with costs.

Per Mr. CHIEF JUSTICE SHEPARD.

November 29, 1907.

34 FRIDAY, *December 13th, A. D. 1907.*

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, appellant, *vs.* THE UNITED STATES OF AMERICA, EX RELATIONE BELLE Frost.	No. 1804.

On motion of Mr. Stuart McNamara, of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue.

And it is further ordered that the mandate in said cause be, and the same is hereby, stayed until further order.

35 UNITED STATES OF AMERICA, SS:

The President of the United States, to the Honorable the Justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between James Rudolph Garfield, Secretary of the Interior, appellant, and The United States of America ex relatione Belle Frost, appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of December, in the year of our Lord one thousand nine hundred and seven.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

36 UNITED STATES OF AMERICA, SS:

To the United States of America, ex relatione, Belle Frost, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein James Rudolph Garfield, Secretary of the Interior, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, chief justice of the Court of Appeals of the District of Columbia, this 13th day of December, in the year of our Lord one thousand nine hundred and seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 17th day of December, A. D. 1907.

CHAS. H. MERILLAT,
Attorney for Defendant in Error.

37 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 36, inclusive, contains a true copy of the transcript of the record and proceedings in said Court of Appeals in the case of James Rudolph Garfield, Secretary of the Interior, appellant, vs. The United States of America, ex relatione, Belle Frost, No. 1804, October term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 18th day of December, A. D. 1907.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

38 (Indorsed:) File No., 20,970. District of Columbia, Court of Appeals. Term No., 246. James Rudolph Garfield, Secretary of the Interior, plaintiff in error, vs. The United States of America, ex relatione, Belle Frost. Filed January 14th, 1908. File No., 20,970.

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Supreme Court, U. S.
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JAMES H. MCKENNEY
Clerk

No. 54.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

v.

THE UNITED STATES EX RELATIONE BELLE FROST, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR, plaintiff in error,
v.
THE UNITED STATES EX RELATIONE BELLE FROST, defendant in error.
} No. 54.

IN ERROR TO THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

[References "R.. " refer to pages of printed record.]

The question involved is the extent and duration of the supervisory power of the Secretary of the Interior in administration of the acts of Congress for distribution of the lands of the Choctaw and Chickasaw nations in severalty to the tribal members.*

It arises in the following manner: Mrs. Frost, an enrolled Choctaw citizen, entitled under acts of Congress to an allotment in severalty of the Choctaw-

* NOTE.—Legislation on this subject, committed by Congress to the Secretary, scattered through volumes of the Revised Statutes and Statutes at Large, is, for convenience of the court, compiled in appendix hereto (pp. 43.)

Chickasaw communal lands, sued in the Supreme Court of the District of Columbia for a writ of mandamus against the then Secretary of the Interior, Ethan Allen Hitchcock, commanding him to deliver or cause to be delivered a patent conveying to her the east half of the east half of the northwest quarter of sec. 7, T. 2 S., R. 5 E.—40 acres. Rule to show cause was issued and served. Respondent filed an answer, demurrer to which was sustained, and the District Supreme Court gave judgment for the relator, which was affirmed by the District Court of Appeals. A writ of error was allowed and the case removed to this court.

THE PLEADINGS.

The petition (R., 1), after setting out respondent's official character and relator's qualification to take an allotment in severalty of the communal tribal land, avers, in substance (R., 4, par. 9), that July 23, 1903, she owned improvements on the land described, and selected it as part of her allotment, after its segregation for town-site purposes had been refused by the Secretary, and it had by him been thrown open to allotment; that it was duly allotted to her, and nine months thereafter—the period allowed for contest by adverse claimants—certificate for allotment thereof was duly issued; that patent was, in accordance with the act of Congress of June 28, 1898, jointly executed by the executives of the Choctaw and Chickasaw nations, which should have been delivered, but the Secretary of the Interior arbitrarily and without legal authority refused to permit such delivery

and, October 23, 1905, directed cancellation of the allotment and that the land be segregated for townsite purposes as an addition to Mill Creek, he claiming to act under authority of the act of Congress of May 31, 1900. Paragraphs 10 to 13 (R., 5–6) set out argument of law in support of the averment that the Secretary's action was without legal authority and arbitrary; paragraph 14 (added by amendment, R., 14) alleges that since her selection of the land it has greatly increased in value and is now worth more than $5,000 in excess of the value of average allottable land subject to selection by her in lieu thereof.

The substituted and amended answer of Secretary Garfield, upon demurrer to which the case was decided below (R., 15), admitted the incumbency of Secretary Hitchcock, his own succession, the communal tribal title to the land, the relator's qualification as a member of the Choctaw Nation to take an allotment, her selection of the land, delivery to her of an allotment certificate by the Commissioner to the Five Civilized Tribes, and the execution of a patent to her by the two tribal executives.

It is then shown (R., 15–16) that neither the allotment of said lands nor the certificate therefor was ever reported to or approved by the Secretary of the Interior; that on October 26, 1900, one hundred and fifty-five and forty-five one-hundredths acres of land, adjoining, but not including, the lands in controversy, were segregated for the townsite of Bryant, later called Mill Creek, under the act of Congress of May 31, 1900 (31 Stat., 221, 237), and between said last-

mentioned date and February 17, 1903, urban settlement, occupancy, and improvement had extended to and upon the land described; that the Commissioner to the Five Civilized Tribes on February 17, 1903, reported that the town contained about 1,200 inhabitants, which would probably soon increase to 2,000 or 3,000; that the tract was partially covered by residences and was much needed for townsite purposes, and recommended its segregation as an addition to the townsite of Mill Creek under said act and the act of July 1, 1902 (32 Stat., 641); that this recommendation was, March 18, 1903, approved by the Commissioner of Indian Affairs, but that the Secretary of the Interior deemed it inadvisable to make the reservation at that time; that the patent, although signed by the tribal executives, was never approved by respondent, delivered to petitioner, or recorded in the office of the commissioner; that respondent was, March 11, 1905, advised that said tract of land was then, and from a time prior to its selection by petitioner had been, under urban occupancy, and on June 19, 1905, he ordered an investigation, and finding the facts to be as stated, that large sums had, prior to such selection, been expended by the inhabitants in building upon and improving said tract, and that such inhabitants were entitled to be protected, petitioner's allotment was, on October 23, 1905, canceled, with leave to select other lands to fill her right to tribal lands in severalty, and the patent, not yet approved, delivered,

or recorded, as aforesaid, was recalled and still remains unapproved on file in the office of Commissioner of Indian Affairs.

It is further averred (R., 17) that relator's right and claim rest solely upon and arise from treaties and acts of Congress; that her claims came before the Secretary for examination, consideration, and approval in due and regular course of administration of communal Indian tribal lands under acts of Congress which subject all allotments of such land in severalty to final approval or disapproval of the Secretary of the Interior, and are intended to and do vest in him superintending and supervisory power over the administration of the allotment acts and allotment of Indian lands in severalty, to prevent injustice or wrong to their occupants, and to recognize, adjust, and preserve equitable claims thereto or rights therein; that Secretary Hitchcock examined and considered relator's claim and all evidence presented by her, and the urban use of the land before her selection, and found, concluded, and determined, under the facts and law applicable, that relator was not rightfully or justly entitled to allotment or title in severalty to the land claimed, but that it ought of right to be, as it was by actual use and occupancy in fact, at the time of relator's selection, set apart and disposed of for urban use as an addition to the town site of Mill Creek, and denied her application.

This answer was held bad on demurrer.

CONTENTIONS OF THE PARTIES.

The primary question is, When does the supervising administrative power of the Secretary of the Interior over his subordinate agencies under the allotment acts cease and his duties become merely ministerial? The Secretary's contention is that this power extends to completion of the allotment, by his approval of the patent conveying the land in severalty to the allottee, and authorization of its delivery. The relator claims that such supervisory administrative power ceased and became ministerial when the subordinate agency, the Commissioner to the Five Civilized Tribes, in the Indian Territory, at end of the contest period of nine months from her selection made and delivered to allottee the preliminary certificate of allotment evidencing allottee's right to possession and occupancy and *prima facie* right to title. Involved in this question is that of the allottable character of the land and rights of the urban, or town, occupants.

ASSIGNMENT OF ERRORS.

The court below erred:

1. In sustaining the demurrer, holding the answer bad in substance and insufficient in law.

2. In affirming the judgment of the Supreme Court of the District of Columbia.

3. In affirming the order for issue of a writ of mandamus against respondent.

4. In holding—

> the statutes are plain and admit of no room for construction. Believing that the Secre-

> tary's power in the premises ended with the issue of the certificate of allotment and the patent, we think that he has no power to hold the patent for cancellation, and that it is his plain duty to deliver it to the relator.

5. In holding in substance (R., 30) that town settlers on the land, who had improved it by sufferance of the Choctaw Nation, building residences and increasing greatly its value, were not entitled to protection and consideration of the Secretary of the Interior because not tribal members.

6. In holding that the land actually appropriated to uses as a town site was subject to selection and allotment.

7. In holding—

> she had received her certificate of allotment. The statute made this certificate conclusive evidence of her right to the land, entitled her to have the Indian agent remove therefrom all persons that were objectionable to her, and declared that his acts in so doing shall not be controlled by the process of any court. Relator's right to the land became vested, and the execution and delivery of the patent—the evidence of legal title—were ministerial acts.

8. In holding—

> As a matter of fact, there was no occasion to construe these acts at all in order to perform the final act demanded of the Secretary, namely, the delivery of the patent. In so far as the relator's rights are involved, all the requirements of the statute have been fully and

regularly performed. Whatever power of direction, supervision, or approval has been conferred upon the Secretary in respect of the allotment of the Indian lands, making regulations therefor, and the reservation of town sites, had been completely exhausted so far as the relator's allotment was concerned. His official duties had been performed.

9. In holding in substance that issue of an allotment certificate by the Commissioner to the Five Civilized Tribes, *never submitted to nor approved by the Secretary of the Interior*, was conclusive evidence of the allottee's right to patent in fee simple in severalty for the land so certified and described, and conferred such vested right as to end the duties of the Secretary respecting such land, prior to completion of the work of administration of the lands of the Choctaw-Chickasaw nations, regardless of equities of settlers, occupants, adverse claimants, or other parties, or rights of said Indian nations, or value of the lands so selected and certified.

10. In denying, in substance, the supervisory power of the Secretary, committed by the allotment acts and by sections 441 and 463 of the Revised Statutes of the United States to him for final approval or disapproval of all allotments of communal Indian tribal lands in severalty to the tribal members.

11. In denying, in substance, power to the Secretary of the Interior to review or supervise acts of the Commission to the Five Civilized Tribes in allotting the Choctaw-Chickasaw lands among the tribal members, or review by the Secretary of his own acts,

for correcting errors of the commission or of himself, requiring review to preserve rights of occupants of such lands, or to effect equality of value in division of such communal lands.

ARGUMENT.

I.

Postulates. The office of the writ of mandamus.

Before discussion of specific errors, two basic principles controlling courts in actions of this kind against administrative officers are noticed as postulates to points of argument. They are so settled as to preclude debate. Controversy begins from, not concerning, them. They limit judicial power. Debate is permissible only as to their effect and bearing on the facts of the particular case.

1. The writ will issue against an executive officer to do a purely ministerial act in which he has no discretion or *quasi* judicial function. (*Roberts* v. *United States*, 176 U. S., 221, 230–231; *United States* v. *Black*, 128 U. S., 40, 48; *Marbury* v. *Madison*, 1 Cranch, 137, 173.)

2. The writ will not issue against executive officers in exercise of official duties involving discretion, even when those duties require interpretation of law, the courts having no power to control, review, or revise acts of the executive department while jurisdiction continues. *United States* v. *Black* (128 U. S., 40, 48); *Riverside Oil Company* v. *Hitchcock* (190 U. S., 316, 335), wherein the court held:

> If this writ were granted, we would require the Secretary to repudiate and disaffirm a de-

cision that he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ can never be used as a substitute for a writ of error.

II.

Questions the Secretary was called upon to decide.

There were three questions necessary for the Secretary to decide:

1. Was the land allottable in severalty to tribal members at all?

2. As between the town-dweller occupants and relator allottee claimant, which had better right?

3. Would the allotment to relator of this tract, with other land selected by her, give to her, as compared to other tribal members and the whole tribal estate, "so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands?"

Was the land allottable in severalty to the tribal members at all.

That it was the purpose of Congress to accord to white noncitizens residing within the Indian country equitable consideration in the division of lands and

to recognize the claims of those who had, at the tacit invitation of the Indians, built cities and towns, becomes manifest from a consideration of the report of the Select Committee on the Five Civilized Tribes (S. Doc. 377, 53d Cong, 2d sess.) and the legislation subsequent thereto. The committee (p. 6) said:

> * * * There has been a large accession to the population of whites who make no claim to Indian citizenship and who are residing in the Indian Territory with the approval of the Indian authorities. * * * Flourishing towns have grown up along the lines of the railroads, composed wholly of white people. * * * Outside of the Cherokee country there are no laws for the organization of municipal governments for these growing towns, and no means by which the population * * * can establish and maintain streets and sidewalks or organize and maintain a constabulary such as has been found indispensable in urban communities. * * *
>
> If * * * they (the Indians) are overrun by a population of strangers five times in number to their own, it * * * comes from their own acts * * * by inviting white people to come within their jurisdiction to become traders, farmers, and to follow professional pursuits. * * * It can not be possible that they (the Indians) can intend to demand the removal of the white people either by the Government of the United States or their own.
>
> They must have realized that when their policy of maintaining an Indian community

> isolated from the whites was abandoned it was abandoned forever. We did not hear from any Indian the suggestion that the white people there with the consent of the Indians should be removed.

By the act of June 28, 1898, "for the protection of the people of the Indian Territory" (30 Stat., 495), it was declared that "all town sites shall also be reserved * * * as incapable of allotment," and (sec. 14) "the inhabitants of any city or town * * * having 200 or more residents therein may proceed by petition to the United States District Court * * * to have the same incorporated," and (sec. 15) "commissions shall cause to be surveyed and laid out town sites where towns * * * are located," and "the owner of the improvements upon any town lots * * * may deposit in the United States Treasury * * * one-half of such appraised value. * * * and such deposit shall be deemed a tender to the tribe of the purchase money for such lot," and "the inhabitants of any town may within one year after the completion of the survey thereof make * * * deposit for parks, etc." * * *

Other reservations, some 20 in number, including lands occupied by schools, churches, court-houses, jails, etc., are provided for, all demonstrating recognition of the fact that there were existing towns and cities, and an intention to protect the rights and equities of the inhabitants thereof utterly inconsistent with the theory that lands which had been subjected to such occupancy were available for allotment purposes.

To them the act of May 31, 1900 (31 Stat., 236, 238), (reenacted Mar. 1, 1901, 31 Stat., 864), added town sites at stations for railways built or being built. It provides that—

> Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw * * * nations not exceeding one hundred and sixty acres in one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such townsite at the time.

This latter act went beyond the former, in that actual establishment of a town was not essential, and the occupancy right of a tribal member had to yield to the reservation. As against such reservation he could not take his occupied land as an allotment, but could claim pay for the value of his improvements.

It does not apply to the allotment of land in actual use as a townsite; its purpose was to authorize reservation, in advance and anticipation of urban development, of land for townsite purposes at points on constructed or projected railroads where towns were expected to come into being. Because it would be manifestly unfair to subordinate an allottee who had selected vacant lands without notice of any intention

to devote the same to town-site purposes, the act required the segregation of lands "at such *stations* as are or shall be established * * * irrespective of the population" to be made *in advance* of allotment. No such reason exists, however, with reference to towns actually in existence, for in such cases selection without notice of urban occupancy and improvement would be practically impossible.

In the special agreement with the Creek Nation (31 Stat., 864, 867, act of March 31, 1901), these provisions were reenacted and, by section 22, special provision was made as to four designated towns, Clarksville, Coweta, Gibson Station, and Mounds, which were to be located "in manner not to include or interfere with the allotment of any citizen *selected prior to date of this agreement*." This was special to the Creek tribe and to the four towns named. Otherwise than by this special provision there was no inhibition against segregation for town-site purposes of land which had been selected, or applied for, as an allotment; on the contrary, as shown in the acts more fully set out in Appendix, an Indian in occupancy, with valuable improvements, was required to give way to a segregation of land for town-site purposes, being allowed compensation for such improvements.

The act of July 1, 1902 (32 Stat., 641, secs. 25, 45, 46, 47, 48), extended the exceptions, and by sections 46 and 47 thereof the Secretary is given power to increase town-site reservations by "additional acreage

* * * for present needs and reasonable prospective growth."

The exception of lands in actual town-site occupancy from allotment was, necessarily, implied by the act of 1898, section 11, requiring that by the allotments there should be given to each member, "so far as possible, his fair and equal share thereof, considering the nature and *fertility of the soil* and the location and value of the land." Location, as an element of value, was eliminated by the act of July 1, 1902, section 9 (32 Stat., 642). Fairly construed, the allotment acts, like the homestead law, contemplated allotment only of agricultural, nonmineral lands which had not been appropriated to public or individual use. Fertility of the soil is a factor of slight or no importance respecting land in town-site occupancy.

In case of conflict between a claimant for allotment of lands in severalty and actual occupants of the same land who have improved and are occupying the same as a town site, the duty necessarily devolves upon the Secretary to decide which disposal should be made. That question was presented when relator's patent came before the Secretary for approval, and, after an investigation, in which she participated and was heard, was decided against her, her right to fill her allotment by selection of other land of allotable character being preserved. He was required also to decide whether the value of the lands claimed exceeded her proper share of the common estate. This

was not definitely determined, because not necessary, but, as will be shown at another point, her claim, on her own assertion, was five times in excess of her right.

III.

The supervisory power of the Secretary of the Interior arises from the Revised Statutes and the express terms and necessary implication of the allotment acts.

This power of the Secretary, as the agent of Congress, to administer the allotment acts does not stand alone on sections 441 and 463 of the Revised Statutes, though they are ample foundation for it (*West* v. *Hitchcock*, 205 U. S., 85). It is given by express terms and by necessary implication in the allotment acts themselves. The express terms are found in the act of June 28, 1898 (30 Stat., 506), that the "allotment shall be made under the direction of the Secretary of the Interior," and by section 24, act of July 1, 1902 (32 Stat., 641, 644), vesting exclusive jurisdiction in the Commission to the Five Civilized Tribes, "under direction of the Secretary of the Interior," of "*all* matters relating to allotment of land."

It arises by necessary implication from the words "authorized," "appoint," "permit," and "approval" as used in the allotment acts. By act of May 31, 1900 (31 Stat., 221, 236), "the Secretary of the Interior is hereby *authorized* * * * to survey, lay out, and plat into town lots" (ib., 233), "where, *in his judgment*, the public interest will thereby be subserved, the Secretary of the Interior may *appoint*

* * * a separate town site commission for any town;" or (ib., p. 238) "may *permit* the authorities of any town * * * at expense of the town to survey, lay out, and plat;" (ib., p. 238) "upon recommendation of the Commission to the Five Civilized Tribes, the Secretary of the Interior is hereby *authorized* at any time before allotment to set aside and reserve any lands" for railroad stations. *Approval* is twice used in section 11, act of July 1, 1902 (32 Stat., 641, 642), as to validation of rolls of tribal members and in act of March 3, 1903 (32 Stat., 982, 996), relating to survey of town plats. It is impossible to give any other construction to the allotment acts than that they make the Secretary of the Interior, the agent of Congress, responsible head over all agents and officers for administration of these acts and to carry out the policy of Congress for allotment or other disposal of the tribal communal lands, authorized to review and control all acts of the other agencies, who are merely subordinates for facilitation of his work.

The statutes nowhere in express terms require approval by the Secretary of the Interior of the allotment certificate or the patent. The tribal authorities, relying upon this lack of specific requirement, opposed the Secretary's construction that his approval was essential to a valid patent, and the question was submitted to the Attorney-General, who, on May 22, 1905 (25 Op. A. G., 460–464), after a full review of the legislation, said:

> I am therefore of opinion that you are authorized to approve the patents in question

> and that your approval is essential to constitute them a transfer of such title as was intended by the legislation in question to be vested in the allottees.

That the Secretary's approval is necessary has therefore been determined by two departments—the one charged with administration of these acts and the other charged with construction of statutes for advice of the Executive. A settled construction by the departments will not be overturned by the courts unless clearly wrong. (*United States* v. *Healy*, 160 U. S., 136, 145; *Hewett* v. *Schultz*, 180 U. S., 139, 157; *United States* v. *Finnell*, 185 U. S., 236, 244.)

IV.

The supervisory power of the Secretary of the Interior continues until ultimate, final action, whereby the title passes that is, until his approval of the patent and authorization of its delivery.

When the power ends has been twice involved in adjudged cases involving Indian Affairs, first, in *Hy-yu-tse-mil-ken* v. *Smith* (194 U. S., 401). There, under error of law that Hy-yu-tse-mil-ken, an Indian woman, was not qualified to claim an allotment because of absence from the reservation, certain land, which should have been allotted to her, was allotted to Smith. In 1897 that decision was reversed, the Secretary directing, however, that she select other land, which she did, but, by suit under act of August 15, 1894 (28 Stat., 286, 305), asserted her right to the land allotted to Smith, and prevailed, the court stating that "when the land department corrected

its mistake of law, the appellee (Hy-yu-tse-mil-ken) had the right to insist upon her original selection," even though the exercise thereof displaced another person, to whom the same land had, in the meantime, been allotted.

A second instance was in *West* v. *Hitchcock* (205 U. S., 80, 84–85). The Secretary had at one time recognized West as a member of the Wichita and affiliated bands by virtue of his marriage to a tribal member. Had that recognition continued, West would have been entitled to allotment of land, but the Secretary revised his decision, and decided West was not a member of the tribe and was not entitled to allotment. West sued for mandamus to compel allotment to him. The court held:

> As his decision is not a matter of any particular form, his answer saying that he has decided the case is enough; for, even if he had not decided it before, such answer would announce a decision sufficiently by itself.
>
> * * * * *
>
> [85]. He raised no question of law, but simply stood on his authority and put forward his decision as final. As we have implied, such answer affirms not merely the past but *the present* determination of the answering tribunal, and must be assumed to be based on reasons that the respondent deems adequate. Even if those given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the Secretary's grounds. He has not disclosed to the court any statement of the grounds purporting to be exhaustive and

> complete, and the court can not make an inquisition into his mental processes to see whether they were correct.

When the Secretary's supervisory power ends has often been decided in cases involving administration of the public-land laws, which, and the acts for allotment of Indian tribal lands in severalty, are analogous systems of legislation, having similar objects, and are committed to administration of the same officer, as general supervising head of two bureaus of the same department. The words creating the power in both cases are the same "Direction" and "Supervision." Decisions in the one are, therefore, by analogy, precedents for decisions in the other as to the nature and extent of the Secretary's supervising power.

In *Knight* v. *Land Association* (142 U. S., 161, 177), followed in *Orchard* v. *Alexander* (157 U. S., 372, 381) and *Stoneroad* v. *Stoneroad* (158 U. S., 240, 249), the court held:

> The phrase "under the direction of the Secretary of the Interior" as used in these sections of the statutes is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims, and the issuing of patents thereon, and the administration of the trusts devolving upon the Government,

> by reason of the laws of Congress, or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and preserve the rights of the people of the United States * * * (p. 178). When proceedings affecting titles to lands are before the department, the power of supervision may be exercised by the Secretary whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. * * * For example, if when a patent is about to issue the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly by and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul.

The power continues, not only throughout the whole proceeding and until consummation of title in the claimant, but for purposes of review of the proceeding, scrutiny, and detection of departmental errors and the institution of actions to correct the same, continues after the proceedings are closed and title consummated.

Of this *Williams* v. *United States* (138 U. S., 514, 523–524) is a striking instance. The act of April 16, 1880 (21 Stat., 287), granted lands to the State of Nevada, to be selected by the State from "any unappropriated public lands." The State selected a tract that the General Land Office certified was of that class and the Secretary approved the list May 3, 1883, closing his jurisdiction over the title. Williams had made desert-land entry of this tract, and in consideration of $5,000 conveyed his rights to a mining company, which erected thereon a quartz mill, costing $58,000. It became embarrassed and its property was sold on execution to others. Williams relinquished his desert-land entry to the United States, induced the State to select the tract under its grant, and purchased it from the State. These facts being ascertained, the Secretary caused suit to be brought by the United States for cancellation of the State's selection list though approved by him. The action prevailed and Williams appealed to this court, which affirmed the decree and, reviewing the facts, held:

> If all questions of jurisdiction and procedure were removed, would any court issue a mandamus to compel the officers of the Land Department to certify those lands to the State? Would not the equity developed by these facts forbid the court to issue such order? The certification after selection by the State is to be approved by the Secretary of the Interior. This is no mere formal act. * * * It gives the power to the Secretary to deny this appli-

> cation of the State, and refuse to approve its selection, and hold the title in the General Government until, within the limits of existing law or by special act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the Government. * * * The statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

So, where the land department, by inadvertence, prematurely issued patent, losing jurisdiction to try a controversy belonging exclusively to it to adjudge, the Secretary caused suit to be brought for cancellation, so that jurisdiction might be restored for adjudication of the pending controversy, and prevailed. The court in *Germania Iron Company* v. *United States* (165 U. S., 379, 365) held:

> When, through inadvertence and mistake, a patent has been wrongfully issued by which the jurisdiction of the land department over

these disputed questions of fact is lost, a court of equity may rightfully interfere and restore such lost jurisdiction, to do which it becomes necessary to cancel the patent.

The necessary conclusions from the foregoing authorities are:

1. The allotment acts vest in the Secretary of the Interior supervisory authority over their administration and over the acts of all officers concerned in such administration.

2. Such supervisory power and jurisdiction over the entire proceeding remains until the final act of approval of the patent and authorization of its delivery.

3. Until such time power remains to review the proceeding, correct errors, and conform final action to a proper and just decision upon the facts before him.

4. That in the instant case his finding and decision as to the urban settlement and improvement of the land recognizing the better right in the town-site occupants, denying approval of patent or right in relator to take the land as part of her allotment, was administrative in character, not controllable by the courts; that the writ will not lie, and the judgment must be reversed and the suit dismissed.

V.

The supervisory power of the Secretary of the Interior is not concluded by section 23, act of July 1, 1902 (32 Stat., 644), nor is it held by decision of this court in *Wallace* v. *Adams* (204 U. S., 415), that such power ends short of his approval of patent.

Relator's main reliance is the section and the decision just mentioned. Though given in the appendix, said section is here quoted:

> SEC. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

It follows sections 19, 20, 21, and 22, relating to *possessory rights* and *present enjoyment* of communal tribal lands and their devolution. Sections 19 and 20 limit holdings and make excess holding a misdemeanor; section 21 fixes penalty for their violation; section 22 provides for devolution of possessory rights of decedents; section 23 lays down a rule of evidence of possessory rights and gives the allottee a summary remedy.

Relator wrenches this section from its context setting and pleads it in sequence to section 71, to which, in legislative thought, it had no reference. Such a violent dislocation of the section is not, it is submitted, susceptible of logical justification. It is a settled rule of statutory construction that particular provisions are construed in the light of their context. Construing this provision as fixing the right to the *title*, beyond the supervisory power of

the Secretary, violates the general scheme of the act vesting such power in him, and deprives of vital force the next following section (24), which gives "exclusive jurisdiction" to the commission "under the direction of the Secretary" of "*all* matters relating to the allotment of land."

If, by the certificate of the commission, there is such an effectual determination of the right to the title for all purposes as to make any subsequent action by the Secretary mere ministerial duties, the provisions of section 24, just referred to, become entirely nugatory and ineffective, and the act of a subordinate is made controlling over the judgment of the superior under whose direction the law commands that he proceed.

Is it not far more reasonable, especially in the light of the language of the court in *West* v. *Hitchcock* (205 U. S., 85), to assume that Congress, in order to make assurance doubly sure that the supervisory power of the Secretary was not to be interfered with by any such construction as is here sought to be placed upon section 23, added section 24 by way of proviso?

The answer expressly states:

> The allotment of lands to petitioner was never reported to the Secretary of the Interior for his approval, nor was such allotment ever approved by him.

The conclusiveness of the allotment contended for in this case depends on the act of the commission alone, without supervision, direction, approval, or knowl-

edge of the Secretary. To uphold such a contention would nullify the scheme of the act by construing independently the language of one section with literal emphasis on the broadest signification of the phrase "right * * * to the tract of land."

This construction is one *haeret in cortice* only, disregarding the general purpose and true intent, killing the spirit by the letter. The learned judge of the trial court fell into this error (folio 22, R. 12), making it the basis of his decision. The Court of Appeals did the same, holding that (R. 32):

> The statute made this certificate conclusive evidence of her right to the land. * * * Relator's right to the land became vested, and the execution and delivery of the patent the evidence of her legal title were ministerial acts.

It is submitted that neither of the decisions in *Wallace* v. *Adams* (204 U. S., 415, and 143 Fed., 716), in light of what was presented for adjudication, justifies the reliance of relator. That was a suit brought by a Choctaw citizen, having a certificate of allotment, against one Hill, a noncitizen, to recover *possession* of land. Hill had, while enrolled as a citizen, lawfully taken possession and applied for allotment of the land to himself. By judgment of the Citizenship Court, rendered before he obtained an allotment certificate, his enrollment was annulled. The land was allotted to McSwain, to whom allotment certificate was issued and who brought suit for possession (143 Fed., 720). There was no patent to

either party. The only question determined was whether the allotment certificate gave its holder right to possession as against one without evidence of citizenship, but who claimed the right to be enrolled as a citizen. This involved the power of the Citizenship Court to render the judgment annulling Hill's enrollment. This court (204 U. S., 419) stated the question submitted thus:

> There is but a single matter to be determined. As counsel for plaintiffs say: The assignment of errors presents but one question. If the decree of the Choctaw-Chickasaw Citizenship Court in the test case, known as the Riddle case, vacated the decree that defendant, Hill, had, theretofore, procured in the United States Court for the Southern District of the Indian Territory, wherein he was adjudged to be a member of the Choctaw tribe of Indians, this case should be affirmed. If it did not, it should be reversed.

No reference was made as to the effect of an allotment certificate nor was any such matter involved between the parties to that litigation. The only part of the opinion in anywise bearing upon the matters in question here is that discussing the relations of the legislative and judicial departments:

> The mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is

> placed by the judgment of the lower court beyond the power of reexamination by a higher court, though subsequently authorized by general law to exercise jurisdiction.

In the Circuit Court of Appeals (143 Fed., 716–721) the matter adjudged was likewise limited, discussing which it was, *arguendo*, said:

> The jurisdiction of the commission and the Secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands in its control. The commission, *under the direction of the Secretary*, constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands, and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal empowered to decide the question that the party to whom it issues is entitled to the land, and it is a conveyance of the right to the allottee. * * * Like a patent, it is impervious to collateral attack. * * * All parties concede in the briefs * * * that the land in question has

> been allotted and that allotment certificates have been issued to the plaintiffs, and the questions presented will be considered in view of this admission.

Discussing the power of Congress over the citizenship of these tribes, the court refers to the public land system for analogy and illustration, *arguendo*, saying:

> The legislative department of the United States may, at any time before one who has occupied and improved land with a view to its preemption, has completed all the preliminaries, entered and paid for the land he seeks to acquire, lawfully convey to another, although the Land Department has already decided that the occupant is entitled to it. * * * Nothing short of entry and payment confer on a settler vested rights against the United States which impair in any respect the plenary power of its legislative department to dispose of the land to another or to withdraw it from sale for the use of the Government. * * * In *Emblen* v. *Lincoln Land Co.* (42 C. C. A., 499; 102 Fed., 558; 184 U. S., 660) * * * complainant had paid fees to the land officers, had conducted a contest for six years, had finally secured an avoidance of the decisions against him and was pressing the case to a hearing before the local land officers, where a time had been set for the trial, when Congress passed an act to the effect that the entry of Weed was confirmed and that a patent should be issued to him forthwith. This court decided * * * that the act of Congress which granted the land to another was neither unconstitutional nor invalid.

Nothing in either opinion impugns our contention that the acts of the Secretary here complained of were administrative decisions of a matter within his sole cognizance. Judge Sanborn, discussing a question of jurisdiction, said that allotment certificates "constitute conveyances of the right to the land," and that "the commission *under the direction* of the Secretary constitutes a special tribunal," which has "exclusive jurisdiction to determine such claims and *to issue such a conveyance*. The allotment certificate, when issued, like a patent to land, is dual in its effect * * * and is a conveyance of the right to the allottee," and is "like a patent."

These statements were not *decision, adjudication, or judicial construction* of the statute, because (1) the effect of such certificate was not there in question; (2) section 23 of the act was not considered; (3) Judge Sanborn was inaccurate in regarding the certificate as a conveyance of title, having the effect of a patent, which latter the act of 1898 (30 Stat., 507) provides shall issue and states its effect, and that its acceptance by the allottee is a quitclaim, or release of right in other tribal land; and section 66, act of 1902 (32 Stat., 656), provides that it shall be recorded.

A dictum, or thing said *arguendo*, is not *decision*, as held clearly by this court in *Wisconsin R. R. Co* v. *Price County* (133 U. S., 496, 508).

The office of the Commission to the Five Civilized Tribes, under the allotment acts, in respect to allotments of communal tribal lands, is analogous to that

of registers and receivers of local land offices respecting public lands. Like the latter, it hears contests between adverse claimants, makes and reports findings and recommendations; likewise, it issues certificates (of allotment) based upon its conclusions concerning the matters coming before it. In the absence of statute so declaring, the certificate of land officials is insufficient as a basis for a possessory action. It was, therefore, essential that a method should be provided to avoid strife and afford a means whereby the lands might be protected against waste during the interval between the issuance of the certificate and the final vesting of title by approval and delivery of patent; this could only be accomplished by giving to the certificate of the commission the same dignity and importance accorded certificates of land officials by state legislation; hence, section 23.

As before stated, *Wallace* v. *Adams, supra*, was a possessory action by a certificate holder against one in possession who was objectionable to her, and in the absence of section 23 it is questionable whether it could have been maintained. It is a far call from the sustaining of such an action to assert that the certificate relied upon to sustain the judgment would preclude the Secretary of the Interior from canceling the allotment because the lands were not allottable, or were in excess of the equitable portion to which the allottee was entitled, or for any other reason open to inquiry or determination.

While it is submitted that Judge Sanborn was inaccurate in stating that the allotment certificate

corresponds to a *patent* to public lands, and that it has the effect of a conveyance, his language with reference to the construction of the allotment acts is applicable, strong, and dependable, sustaining our contentions to their full extent, viz:

1. The action of the commission in allotments of land is "under direction of the Secretary" (and hence is not conclusive without his final approval); that the commission, as to allotments, occupies the same relative status as local land officers issuing certificates upon entries of public lands; that the Secretary is over both as the supervisory head; that until final action is taken by him, administrative jurisdiction is not closed.

2. As the statute requires issuance of patent, and the Secretary, advised by the Attorney-General, *supra*, has reserved approval of it to himself, title is not passed, the allotment is *in fieri*, until he approve the patent and authorizes its delivery.

VI.

The Secretary of the Interior never authorized allotment of this tract. Determination as to whether it was allottable or not was under his consideration until October 23, 1905, when he decided in the negative.

The petition alleges (par. 12, R., 6) that on March 18, 1903, the Secretary disapproved a petition for segregation of the land as an addition to Mill Creek, theretofore recommended by the commission and Commissioner of Indian Affairs, and that "thereafter the land was thrown open for allotment and was duly allotted to petitioner," but the fact as stated by the

answer (R., 15–16), and admitted by demurrer, is that:

> Prior to February 17, 1903, urban settlement, occupancy, and improvement extended upon the land in question, and the Commission to the Five Civilized Tribes that day recommended such tract be segregated as an addition to Mill Creek * * * and reported * * * these lands "are partially covered by residences and are much needed for townsite purposes." March 12, 1903, the Commissioner of Indian Affairs concurred in such recommendation. March 18, 1903, respondent's predecessor, in view of the act of March 3, 1903 (32 Stat., 982, 996), deemed it inadvisable to make the reservation. Thereafter, on or about July 23, 1903, the petitioner selected the lands described as part of her allotment and subsequently a certificate of allotment was issued to her by the commissioner, but the allotment of the lands to the petitioner by the commissioner was never reported to the Secretary of the Interior for his approval, nor was such allotment ever approved by him.

The mere fact that the Secretary "deemed it inadvisable to make a reservation" at a particular time was in no sense a decision throwing the land open for allotment, regardless of its condition or the use to which it was being devoted; nor was it a decision foreclosing town-site appropriation and segregation whenever the matter should be formally presented. It lacked finality, judgment, or conclusiveness, and left the land as it was, *sub judice*, its status

to be determined, as between town-site appropriation and any claim for individual allotment, when adverse claims should come before him.

March 11, 1905, such adverse claims came before him on report that it was, and had been, since a time prior to relator's selection, in urban occupancy by many inhabitants as an actual town site, having valuable improvements thereon. This report was investigated and found to be true, and, exercising his supervisory power, at the first opportunity of considering relator's claim, denied it, ordered cancellation of the allotment, refused approval of the patent, and reserved the land. This reservation he might have made, but was not required to make before. In words of the opinion in *West* v. *Hitchcock* (204 U. S., 84), whatever defect there may have been in his former action:

> If he had not decided it before, such answer would announce a decision sufficiently by itself. * * * [85]. Such answer affirms not merely the past, but the present determination of the answering tribunal, and must be deemed to be based on reasons that the respondent deems adequate. Even if those given in the letter of July 1, 1901 (July 18, 1903, herein), had been bad, they could not be taken to exhaust the Secretary's grounds. * * * The court can not make inquisition into his mental processes to see whether they were correct.

As held in *Wallace* v. *Adams* (*supra*), the supervisory power of the Secretary of the Interior under the allotment acts is like that exercised by him in admin-

istration of the land laws. The proceedings are also analogous: The selection is the analogue of an entry; the allotment certificate is the analogue of a local land office's final receipt. Both are consummated by patent conveying title. The court held in *Brown* v. *Hitchcock* (173 U. S., 473, 478) that:

> Power is vested in the departments to determine all questions of equitable right or title upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government.

This was in substance repeated in *Oregon* v. *Hitchcock* (202 U. S., 60, 70), wherein it was held that:

> Until the legal title passes from the Government inquiry as to equitable rights comes within the cognizance of the Land Department.

Homologizing the two systems of law and proceedings thereunder, jurisdiction here remained in the Secretary until approval by him of the allotment patent. The allotment certificate no more passes title than does the final certificate upon a public-land entry. Until patent issues and title passes, the right to the title is subject to investigation; equitable rights come within the cognizance of the Secretary, and the final receipt, or its analogue, the allotment certificate, may for good cause be annulled. (*Guaranty Savings Bank* v. *Bladow*, 176 U. S., 448, 453; *Michigan Lumber Co.* v. *Rust*, 168 U. S., 589, 592–593; *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S., 288, 326–327.)

VII.

The Secretary of the Interior was, from the first legislation looking to dissolution of tribal relations of the Five Civilized Tribes, made supervising head of all agencies to effect that policy, and the magnitude of the work was such that some supervising head was necessary.

The first act on the subject was that of March 3, 1893 (27 Stat., 645), creating the Dawes Commission, whose report to the Secretary was required to be by him submitted to Congress, with a view to legislation bringing Indian Territory as a State into the Union. Every subsequent act consistently followed the policy of committing administration to his supervision.

The magnitude of the work appears when it is considered that these acts involved disposal of 28,440 square miles—18,202,000 acres—(Annual Rep. Sec'y Interior, 1902, part 1, p. 596–597) inhabited in 1900 by 355,225 people (12th Census, vol. 1, P. XVIII), estimated in 1906 at 750,000, of which only 92,122 were citizens of Indian tribes. (Report Com. Ind. Affairs, 1906, p. 148.) Less than one in eight could claim title as Indians to the land they inhabited.

The area to be parceled to one-eighth of its people is about that of South Carolina, and 4,000 square miles more than Rhode Island, Delaware, Connecticut, New Jersey, and Massachusetts combined; inhabited in 1900 by 10,000 more people than Nevada, Wyoming, and Idaho combined, and more than either Montana, Utah, or North Dakota. The growth since 1900 has been more rapid than that of either of these States. In administration of such interests

committed to the Secretary, in words of this court in *Williams* v. *United States* (*supra*)—

> It is obvious * * * matters not foreseen, equities not anticipated, and which are not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

VIII.

The Secretary's decision made such disposal of the land as a court having jurisdiction in like case must inevitably have made, as the only just, proper, or lawful disposal of the land.

This aspect of the case is here presented in justice to the Secretary charged with arbitrary action, but with protestation that his action here was administrative and the court has no jurisdiction to review it. Judicial jurisdiction goes no further than to ascertain whether the proceedings had by the Secretary were purely ministerial. If they were not, judicial jurisdiction ends, regardless of error or mistake in the Secretary's action, because the court can not, in this form of action, review or correct error of judgment. "The writ can never be used as a substitute for a writ of error." (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316.)

Recognizing the benefits and advantages resulting to the Indians from the development of towns and cities, centers of educational and industrial advantages, the act of 1898 (30 Stat., 508) gave town-site occupants, Indians or not, preference right to buy

"one residence and one business lot" on which they had improvements. This was not only within plenary power of Congress, but it was equitable. The town builders, acting with the tacit consent and approval of the Indians, added value to the land built upon and to all surrounding territory, thus enriching the tribe and stimulating progress in civilization. They built homes, churches, and schools, developed trade, stimulated industry, and have all the equity of occupying tenants, with beneficial improvements.

During administration, stimulated by the opening of a vast property rich in natural resources, there came a tide of immigration; projected town sites proved too narrow, and town settlement overflowed upon adjoining unreserved land. Necessity outran foresight; conditions outran theory. Congress and the Indian tribes recognized this, and, by their joint act (secs. 46, 47, 48, act of July 1, 1902) authorized urban use of such additional acreage "as may be necessary for the present needs and reasonable prospective growth of said towns."

After the land was *in fact* part of a developed town site and in the face of it, the relator in fraud of rights of prior occupants, included it in her selection. She was only entitled to a "fair and equal share" of the tribal estate "considering the character and *fertility* of the soil and * * * *value* of the lands," without regard to *location*, which was eliminated by section 9, act of July 1, 1902 (32 Stat., 642). If she could secure a property covered by residences and

other buildings and improvements, manifestly her share would be far from fair and equal.

By fair intendment of the allotment acts town-site *use* excludes land from allottable character as clearly as like use excludes public lands from homestead entries, and for the same reasons. The Indian allotment and the homestead are alike individual appropriations of vacant lands for homes and agricultural use. Disposal of land in use as a town site is in both land systems specially provided for, and the special provision by necessary implication excludes operation of the general provisions.

The Secretary, March 18, 1903, might very properly have approved the recommendations for segregation of the land as additional to the Mill Creek town site, but whether his action that it was then "inadvisable to make the reservation" was an error of judgment is here immaterial. Had he then reserved it, rights of town-site occupants would have been safe and this claim would not have arisen. But no title passed. The land remained under his administrative jurisdiction. (*West* v. *Hitchcock*, *supra*; *Barden* v. *Northern Pacific R. R. Co.*, *supra*.) The error of judgment, if error, gave relator no right to take the town site in allotment, nor, had it been allottable land, did it give her the right to take the land in allotment without the Secretary's approval. It did not foreclose the Secretary's power to protect the rights, both legal and equitable, of the town occupants. He investigated the facts, and, hearing petitioner's claim, found the town-site occupants

were prior in time and prior in right. October 23, 1905, he reserved the land. That action was not arbitrary. It was right and equitable.

Relator has mistaken both her right and her remedy. Her right was to take land not in town-site occupancy in "fair and equal share," "considering the character and fertility of the soil and the * * * value of the lands." In attempting to take town-site land she was outside her right, claiming in fraud of prior and better rights.

Her remedy as to improvements was, like other town occupants, to buy her improved lots "at fifty per centum of the appraised value" exclusive of valuation of improvements (act of 1898, 30 Stat., 508). Thereby she would save her improvements and profit besides as to half the unimproved value of the lot on equal terms as other town occupants. Proceeds of town lots go to the tribal common fund, ultimately to be divided, and she will get her share.

She has another remedy, at election, as to improvements. She can claim pay for them out of proceeds of town-lot sales (section 48, act of 1902), and can in no event suffer loss. She has neither legal right nor equity to take to herself the homes and improvements of other town-site occupants, which she did not build and which cost her nothing. Exercise of her allotment right was properly held by the Secretary subject to the maxim *sic utere tuo ut alienum non laedas*. That rule of right protects the homes and improvements of other town-site occupants from being taken to her enrichment and their ruin.

With reference to the allegation that this land has a value of "more than $5,000 in excess of the average of allottable land now subject to selection," this is studiously moderate; merely enough to confer appellate jurisdiction, had she been cast by the court below, so that the enormity of her attempted wrong is not disclosed. It is not the *value* that stamps her attempt a fraud, so much as the *fact* that *homes* and *firesides* of other town-site occupants are attacked by her. Owners of these homes are the real parties whose interests it was the Secretary's duty, and which he sought, to protect. It is their equities—rights under the allotment acts—which the Secretary contends he has power to protect under the decisions in *Williams* v. *United States; Knight* v. *Land Association; Orchard* v. *Alexander; Stoneroad* v. *Stoneroad; Brown* v. *Hitchcock;* and *West* v. *Hitchcock*, cited and discussed herein. This equitable aspect of the case is not, in respondent's view, within judicial cognizance in this form of action, but is set out in justice to respondent's predecessors and himself against charge of arbitrary conduct.

It is respectfully submitted as a matter of law that the action complained of was not subject to judicial review; also, that upon the facts admitted by demurrer, if within jurisdiction of the court to review, the action taken was right; and, consequently, that the judgment should be reversed, with costs, and the action dismissed.

OSCAR LAWLER,
Assistant Attorney-General.

Appendix.

Legislation respecting powers and duties of the Secretary of the Interior and parts of allotment acts applicable to contentions of parties herein:

Revised Statutes:

Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects * * *. *Third.* The Indians.

Sec. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and all matters arising out of Indian relations.

Act of March 3, 1893 (27 Stat., 645):

The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and

suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

* * * * *

Such commissioners shall, under such regulations and directions as shall be prescribed by the President, through the Secretary of the Interior, enter upon negotiation with the several nations of Indians as aforesaid in the Indian Territory, and shall endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each such nation, tribe, or band, respectively, as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be found just and suited to the circumstances. * * * But said commissioners shall, however, have power to negotiate any and all such agreements as, in view of all the circumstances affecting the subject, shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a territory of the United States with a view to the admission of the same as a State in the Union.

The commissioners shall, at any time, or from time to time, report to the Secretary of the Interior their transactions and the progress of their negotiations, and shall, at any time, or from time to time, if separate agreements shall be made by them with any nation, tribe, or band in pursuance of the authority hereby conferred, report the same to the Secretary of the Interior for submission to Congress for its consideration and ratification.

Act of June 10, 1896 (29 Stat., 321, 340).

CONTINUING WORK OF DAWES COMMISSION.

It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which shall rectify the many inequalities and discriminations now existing in said Territory and afford needful protection to the lives and property of all citizens and residents thereof.

An act for the protection of the people of Indian Territory, and for other purposes, June 28, 1898 (30 Stat., 495):

SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed * * * the commission heretofore appointed under acts of Congress, and known as the Dawes Commission, shall proceed to allot the exclusive use and occupancy of the surface of all lands of said nation or tribe *susceptible of allotment* among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; * * * and all town sites shall be reserved to the several tribes, and shall be set apart by the commission heretofore mentioned, as incapable of allotment. There shall also be reserved from allotment a sufficient amount of lands now occupied by churches, schools, parsonages, charitable institutions, and other public buildings for their present actual necessary use and no more. * * * also sufficient land for burial grounds where necessary. When such allotment of the lands of any tribe has been by them completed, said commission shall make full report thereof to the Secretary of the Interior for his approval. * * *

SEC. 12. That when report of allotments of lands of any tribes shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act.

SEC. 13. The Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals. * * *

SEC. 5. There shall be a commission in each town * * * to consist of [three members, one appointed by the executive of the tribe, one by the Secretary, one by town] * * * and if the executive of the tribe or the town fail to select members, they may be selected and appointed by the Secretary of the Interior. * * * All town lots shall be appraised by said commission at their true value, excluding

improvements, and separate appraisements shall be made of all improvements thereon; and no such appraisement shall be effective until approved by the Secretary of the Interior. * * * The owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings, may deposit * * * one-half of such appraised value * * * and such deposit shall be deemed a tender to the tribe of the purchase money for such lot. * * * All town lots not improved as aforesaid shall belong to the tribe, and shall be in like manner appraised, and after approval by the Secretary of the Interior, and due notice, sold to the highest bidder. * * * The person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title to such land or town lots; and thereafter the purchase money shall become the property of the tribe and * * * be paid per capita to the members of the tribe. * * *

Sections 17 and 18 forbid and make it a misdemeanor punishable by fine and commitment in any manner—

to hold possession of any greater amount of lands or other property belonging to such nation or tribe than that which would be his approximate share of the lands bdonging to such nation or tribe and that of his wife and his minor children as per allotment herein provided * * *

The Choctaw-Chickasaw agreement in act of June 28, 1898 (30 Stat., 505):

That all lands within the Indian Territory bdonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

Ib., 506:

All lands set apart for town sites * * * [other reservations to number of twenty, some being general classes] shall be exempted from division. * * *

The appraisal and allotment shall be made under the direction of the Secretary of the Interior, and shall begin, etc. * * *

Ib., 507:

That as soon as practicable after the completion of said allotments the principal chief of the Choctaw Nation and governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in accordance with the requirements of this agreement, excepting all coal and asphalt in or under said land. Said patents shall be framed in accordance with the provisions of this agreement, and shall embrace the land allotted to such patentee and no other land, and the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a relinquishment of all his right, title, and interest in and to any and all parts thereof, except the land embraced in said patents, except also his interest in the proceeds of all lands, coal, and asphalt herein excepted from allotment.

Ib., 508:

Town sites. * * * When said towns are so laid out, each lot on which permanent, substantial, and valuable improvements, other than tillage, and temporary houses, have been made, shall be valued by the commission. * * * The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property. * * * (Reenacted Mar. 1, 1901, 31 Stat., 866, secs. 12 and 13.)

Act of May 31, 1900 (31 Stat., 221, 236):

The Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee nations as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable

prospective growth of such towns. * * * (Reenacted Mar. 1, 1901, 31 Stat., 864.)

Ib., 237:

Where, in his judgment, the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee nations a separate town-site commission for any town. * * * (Reenacted Mar. 1, 1901, 31 Stat., 864.)

Ib., 238:

The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town in any of said nations, at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval as in other instances. * * * [Reenacted Mar. 1, 1901.]

It shall not be required that the town-site limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such town-site limits and corporate limits shall be so established as to best subserve the present needs and reasonable prospective growth of the town as the same shall appear at the time when such limits are, respectively, established: * * * [Reenacted Mar. 1, 1901.]

Upon the recommendation of the Commission to the Five Civilized Tribes, the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding 160 acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such town site at the time. * * * Whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior. [Reenacted Mar. 1, 1901.]

Act of March 1, 1901 (31 Stat., 861, 864), reenacted all provisions *so noted* in former acts, and are not here repeated.

Act July 1, 1902 (32 Stat., 641):

SEC. 6. The word "select" and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office to be established by the Commission to the Five Civilized Tribes for the Choctaw and Chickasaw nations for particular tracts of land.

SEC. 9. All lands belonging to the Choctaw and Chickasaw tribes in the Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value: *Provided,* That in determining such value consideration shall not be given to the location thereof, to any mineral deposits, or to any timber except such pine timber as may have been heretofore estimated by the Commission to the Five Civilized Tribes, and without reference to improvements which may be located thereon.

SEC. 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations * * * as soon as practicable after the approval by the Secretary of the Interior of his enrollment * * * which land may be selected by each allottee so as to include his improvements.

SEC. 12. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allotable land of the Choctaw and Chickasaw nations as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

SEC. 14. When allotments as herein provided have been made to all citizens * * * the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold

at public auction * * * and so much of the proceeds
may be necessary for equalizing allotments shall be used
that purpose, and the balance shall be paid into the Treas
of the United States to the credit of the Choctaws
Chickasaws and distributed per capita, as other funds of
tribes.

SEC. 16. All lands allotted to the members of said trib
except such land as is set aside to each for a homestead
herein provided, shall be alienable after issuance of patent
follows: One-fourth in acreage in one year, one-fourth in ad
age in three years, and the balance in five years; in each c
from date of patent.

SEC. 19. It shall be unlawful after ninety days after
date of the final ratification of this agreement for any me
ber of the Choctaw or Chickasaw tribes to enclose or h
possession of in any manner, by himself or through anoth
directly or indirectly, more lands in value than that of th
hundred and twenty acres of average allottable lands of
Choctaw and Chickasaw nations, as provided by the ter
of this agreement, * * * and any member of said tri
found in such possession of lands, or having the same in
manner enclosed, after the expiration of ninety days af
the date of the final ratification of this agreement shall
deemed guilty of a misdemeanor.

SEC. 20. It shall be unlawful after ninety days after
date of the final ratification of this agreement for any Ch
taw or Chickasaw freedman to enclose or hold possession
in any manner, by himself or through another, directly
indirectly, more than so much land as shall be equal in va
to forty acres of the average allottable lands of the Choct
and Chickasaw tribes as provided by the terms of this agr
ment, * * * and any freedman found in such possess
of lands, or having the same in any manner enclosed, af
the expiration of ninety days after the date of the fi
ratification of this agreement, shall be deemed guilty o
misdemeanor.

SEC. 21. Any person convicted of violating any of
provisions of sections nineteen and twenty of this agr
ment shall be punished by a fine not less than one hund
dollars, and shall stand committed until such fine and co
are paid (such commitment not to exceed one day for ev

two dollars of said fine and costs), and shall forfeit possession of any property in question, and each day on which such offense is committed or continues to exist shall be deemed a separate offense. * * *

SEC. 22. If any person whose name appears upon the rolls prepared as herein provided shall have died subsequently to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs * * *.

SEC. 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land.

SEC. 26. The following lands shall be reserved from the allotment of lands herein provided for: (a) All lands set apart for town sites, either by terms of the Atoka agreement, the act of May thirty-first, nineteen hundred (*supra*, 31 Stat., 236, 237), as herein assented to, or by the terms of this agreement: * * *

SEC. 45. The Choctaw and Chickasaw tribes hereby assent to the act of Congress approved May thirty-first, nineteen hundred (31 Stat., 221, *supra*), in so far as it pertains to town sites in the Choctaw and Chickasaw nations, ratifying and confirming all acts of the Government of the United States thereunder, and consent to the continuance of the provisions of said act not in conflict with this agreement.

SEC. 46. As to those town sites heretofore set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes as provided in said act of Congress of May thirty-first, nineteen hundred, such additional acreage may be added thereto, in like manner as the

original town site was set apart, as may be necessary for the present needs and reasonable prospective growth of said towns. * * * not to exceed six hundred and forty acres for each town site.

SEC. 47. The lands which may hereafter be set aside and reserved for town sites upon the recommendation of the Commission to the Five Civilized Tribes, under the provisions of said act of May thirty-first, nineteen hundred, shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites not to exceed six hundred and forty acres for each town site.

SEC. 48. Whenever any tract of land shall be set aside for town-site purposes, as provided in said act of May thirty-first, nineteen hundred, or by the terms of this agreement, which is occupied by any member of the Choctaw or Chickasaw nations, such occupant shall be fully compensated for his improvements thereon out of the funds of the tribes arising from the sale of town lots. * * *

SEC. 66. All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations, in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land titles, as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records.

SEC. 71. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen * * * of the Choctaw or Chickasaw tribes, as provided in this agreement, no contest shall be instituted against such selection.

The act of March 3, 1903 (32 Stat., 982, 996), appropriated $25,000 for town-site expenses, but provided:

That the money hereby appropriated shall be applied only to the expenses incident to the survey, platting, and appraisement of town sites ~~heretofore~~ set aside and reserved from allotment: *And provided further*, That nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties, where stations are

ocated along the lines of railways, nor the unrestricted alien-ation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior.

All foregoing statutes were law prior to relator's allotment certificate, governing all right thereby acquired. The following are subsequent legislation on the subject of allotments and town lots.

The act of March 3, 1905 (33 Stat., 1048, 1059), appropriated $10,000 for expenses of completing town-site work in the Choctaw, Chickasaw, Creek, and Cherokee nations, and provided further:

The several town-site commissions, the Choctaw, Chickasaw, Creek, and Cherokee nations, shall, upon the completion of the appraisement of the town lots in their respective nations, be abolished by the Secretary of the Interior at such time as in his judgment it is considered proper; and all unfinished work of such commissions, the sale of town lots at public auctions, disposition of contests, the determination of the rights of claimants, and the closing of all other minor matters pertaining thereto, shall be performed by the Secretary of the Interior under such rules and regulations as he may prescribe: * * * and the various provisions of law in conflict herewith are modified accordingly.

The act of July 30, 1908 (35 Stat., 70, 91), appropriated $143,410 to the purpose expressed, as:

For the completion of the work heretofore required to be done by the Commission to the Five Civilized Tribes * * * to be disbursed under the direction of the Secretary of the Interior, and the Secretary of the Interior is directed to so disburse this appropriation as to complete said work by July first, nineteen hundred and nine.

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Act of February 25, 1903 (32 Stat., 854, 891):

> For pay of one clerk, to be appointed by the Secretary of the Interior, to sign, under the direction of the Secretary, in his name and for him, his approval of *all* tribal deeds to allottees and deeds for town lots made and executed according to law for *any* of the Five Civilized Tribes of Indians in the Indian Territory, one thousand two hundred dollars, to be immediately available.

Act of April 26, 1906 (34 Stat., 137):

> SEC. 5. That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; *and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title*, and shall be delivered *under the direction of the Secretary of the Interior* to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending be-

fore the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act.

SEC. 6. That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.

If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

DEC 8 1909
JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States.

October Term, 1909.

RICHARD A. BALLINGER, Secretary of the Interior,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA, EX REL BELLE FROST,
Defendant in Error.

No. 54.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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vs.
THE UNITED STATES OF AMERICA, ex rel BELLE FROST, *Defendant in Error*.
No. 54.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

This is an appeal by the Secretary of the Interior from an order entered by the Supreme Court of the District of Columbia directing that a writ of mandamus issue (R. 22) commanding the Secretary of the Interior to issue or cause to be issued to Belle Frost, a duly enrolled citizen of the Choctaw Nation, a patent executed by the Principal Chief of the Choctaw and Governor of the Chickasaw Nations conveying to her forty acres of land adjoining the town site of Mill Creek in these Indian nations, a certificate of allotment in severalty of said lands having been some considerable time before issued to her by the Commissioner to the Five Civilized Tribes, otherwise known as the Dawes Commission. The writ was ordered to issue after a demurrer of Belle Frost (R. 21) had been twice sustained and the Secretary had elected to stand on his second answer to the petition for the writ of Mrs. Frost (R. 22).

Statement of the Case.

Mrs. Frost is a duly enrolled citizen and blood member of the Choctaw Nation (R. 4) in the Indian Territory, now the State of Oklahoma, which nation or tribe, with the allied Chickasaw Tribe, long has claimed exclusive sovereignty or title in fee, subject to a bare possibility of reversion, to a large area of land in the Indian Territory. With the lands of other of what are known as the Five Civilized Tribes their domain comprises the old Indian Territory. Many years ago in pursuance of a policy of the United States these more or less civilized tribes of Indians were removed from States east of the Mississippi River to a large tract of country between the State of Kansas and the present State of Texas, which under the designation of the Indian Territory was set apart for the exclusive occupancy of Indian tribes. These lands, including those in controversy, were given them in exchange for their former lands in the East. By the terms of the original Choctaw treaty of 1830 (Trans. Rec., p. 2), the present lands were conveyed by the United States to the Choctaw Nation "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it." By the Choctaw and Chickasaw Treaty of 1855 the United States guaranteed these lands to the members of both Indian tribes, their heirs and successors, to be held in common, each tribal member to have an equal undivided interest in the whole, but the tribes to have no right to sell any part of their lands without the consent of the United States and the lands to revert to the United States if the Indians and their heirs should become extinct or abandon the lands (R. 2). The Indians had their own tribal government and under the

suzerainty of the United States conducted their own affairs, at first to the exclusion of white persons.

In time, however, white civilization pressed all around these Indians, their country was opened to railroads, whites intermarried with the Indians and in time settlers were many. Towns sprang up. This tendency towards intermingling with the whites was most pronounced in the Cherokee and Creek Nations. The United States finally decided the time had come to receive the Indians into full citizenship, to break up the tribal governments and, recognizing the fact these Indians had practically an absolute though technically a base title in fee to their lands, it was determined to divide the lands among them in severalty on terms agreed to or accepted by the Indians.

A Commission was appointed, known as the Dawes Commission and it negotiated agreements with the several civilized tribes, including the Choctaws and Chickasaws. By this time quite a complex civilization was in existence side by side with the less progressive tribal system Agreements were made for the enrollment of tribal members and for the division in severalty of the lands among those found entitled thereto by tribal rights. Up to this time while certain primitive rights of occupation, possession and improvement of land were recognized by the Indians as giving an exclusive and valuable holding no person had his separate indefeasible right in any particular tract of land but all had a common interest in the whole. The effect of the agreements made and legislation enacted in pursuance of the primary purpose of Congress was that the United States parted with its reversionary interest in the Choctaw-Chickasaw lands in consideration that it, under certain statutory directions, lim-

itations and restrictions, might determine who were tribal members, committees of Congress in 1893 having found the Indian governments unfit to handle fairly the important and valuable rights involved in citizenship and allotment, and in consideration also of acceptance of land in severalty by the individual Indians, renunciation by each Choctaw and Chickasaw citizen of any claim to other than his individual segregated allotment and segregated share of tribal funds, the dissolution of tribal government, the incorporation of the Indians into the American body politic and the transfer by the Indians, on certain conditions and reservation from allotment, of a relatively small amount of land needed for town site, charitable and educational purposes. With the exception of these reservations all the land was to be partited among the Indians individually, and to protect the individual Indians in the lands according to their special claims there-against, preferential right of allotment to a lawful average allotment was given the individual Indian who had made improvements on any special tract. Safeguards were thrown around the administrative features of this grand scheme of enrollment and distribution, the views of the Indians secured, limitations created and assents of the tribes obtained. With respect to the reservation of land from allotment for town sites special legislation was enacted whereby the United States might create towns and withhold from allotment the land so needed and reserved for town site purposes; and special legislation also was enacted for adjudication of conflict of claims between any parties to special tracts.

The rights of the Choctaw and Chickasaw tribes as holders of the fee to the lands was fully recognized throughout all the legislation of Congress on the subject,

as appears from section 4 of the act of June 28, 1898 (30 Stat., 495, 1 Kappler 90), which compels persons who have made improvements on the lands under claim of citizenship, but whose claims are decided adversely, to dispose of improvements within a specified time to "any member of the tribe owning the land who desires to take the same in his allotment." The subsequent legislation frequently contains similar provisions of recognition of the fact that the Indians in the Five Civilized Tribes had not only a possessory right but a full and completed title to their lands, and the Choctaws were allowed freer sway as to intruders or non-members than were the Cherokees.

The first reservation of land from allotment was provided for in section 11 of the act of June 28, 1898, which reserved from allotment mineral deposits and land for town sites, churches, schools, burial grounds and charitable institutions. By this section towns and cities heretofore incorporated or incorporated under this act were authorized to secure by condemnation all the lands actually necessary for public improvements. Town site commissions to lay out town sites were provided for by section 15 of the act. All other land was thrown open to allotment, except as to a few special charitable or other reservations made in the Choctaw and Chickasaw agreement known as the Atoka agreement of April 23, 1897, incorporated into this act of June 28, 1898 (30 Stats., 495, 1 Kappler, 646). This Choctaw-Chickasaw agreement also contained a number of restrictions on the general town site provisions in the first part of the general Five Civilized Tribes act of June 28, 1898. One provision declared that the Choctaw-Chickasaw Commission "shall lay out town sites, to be restricted as far as possible to their present limits."

The act of May 31, 1900 (31 Stat., 227, 1 Kappler, 106), authorized the Secretary of the Interior, under rules and regulations to be prescribed by him, to plat town sites where there were 200 people or more, and authorized him to appoint separate town site commissions for any town, or where in his judgment the public interests would be subserved to permit the town authorities at the expense of the town to survey, lay out and plat the site thereof, subject to his supervision and approval. This act provided that the town site limits and the corporate limits need not be identical or coextensive, but "shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established: *Provided, further,* That the exterior limits of all town sites shall be designated and fixed *at the earliest practical time* under rules and regulations prescribed by the Secretary of the Interior."

The act further authorized the Secretary of the Interior, upon the recommendation of the Commission to the Five Civilized Tribes, "at any time *before allotment* to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek or Cherokee Nations, not exceeding 160 acres in any one tract," at stations of railroads constructed or in process of construction "prior to the allotment of the lands therein, and this irrespective of the population of such town site at the time." It was under this provision Mill Creek, adjoining which Mrs. Frost took her allotment, was made a town site. Elaborate provisions as to the town site commissions and disposition of the land were made.

By the act of May 27, 1902 (32 Stat., 245), $50,000 was appropriated to pay all expenses of surveying, plat-

ing and appraising town sites, the Secretary of the Interior was authorized to fill vacancies in town site commissions, authority was given the Secretary to define as early as practicable town limits in towns having less than 200 people, and it was provided that no person shall be deported as an intruder "who is in lawful possession of any lots or parcels of land in any town or city in the Indian Territory which has been designated as a town site under existing laws and treaties."

By the Choctaw-Chickasaw agreement approved July 1, 1902 (32 Stat., 641, 1 Kappler, 771), "allotable lands" was defined (section 8), to mean "all the lands of the Choctaw and Chickasaw tribes not herein reserved from allotment; appraisement was directed (section 9) of "all lands belonging to the Choctaw and Chickasaw Tribes in the Indian Territory, except such as are herein reserved from allotment," this appraisement to be made (section 10) by the Dawes Commission and tribal representatives. Reservation was made from allotment (section 26) of "all lands set apart for town sites either by the terms of the Atoka agreement (the Choctaw-Chickasaw agreement hereinbefore referred to of 1897), the act of Congress of May 31, 1900, as herein assented to, or by the terms of this agreement." The other lands reserved included railroad—used lands, segregated and reserved coal and asphalt lands and certain lands for eleemosynary and other special purposes. By sections 45 to 54 inclusive, provision was made for town site proceedings. The Indian nations assented to the act of May 31, 1900, so far as not in conflict with this agreement, and it was provided (sections 46 and 47) that as to any already-created or hereafter-created town sites "set aside by the Secretary of the Interior on the recommendation of the Commission to the

Five Civilized Tribes, as provided in the act of May 31, 1900," acreage of the town site might be increased or created where "necessary for the present needs and reasonable prospective growth" of the town sites, not exceeding 640 acres. Additional town site commissions and boards of appraisers were provided for as "the Secretary of the Interior (section 50) may deem necessary for the speedy disposal of all town sites in said nations. Provided, that the jurisdiction of said additional town site commissions shall extend to such town sites only as shall be designated by the Secretary of the Interior."

All lands not reserved as provided were declared to be allotable lands and (section 11) open to allotment by tribal members, of whom petitioner is conceded to be one.

By the Indian Appropriation Act of March 3, 1903 (32 Stat., 982), $25,000 was appropriated to defray town site expenses but with this proviso: "That the money hereby appropriated shall be applied only to the expenses incident to the survey, platting and appraisement of town sites heretofore set aside and reserved from allotment; and provided further, that nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

By the Indian Appropriation Act of April 21, 1904 (33 Stat., 189), $25,000 was appropriated to complete the town site appraisement and surveys in the Indian Territory under the provision of the act of June 28, 1898, with the proviso "that said work shall be completed on or before July 1, 1905."

Under the provisions of the acts referred to and especially of the acts of 1900 and 1902, a number of towns were laid out, including a number of government town sites, and the land reserved from allotment. Among the town sites laid out under the act of 1900 was that of Mill Creek on the line of a railway system traversing the Chickasaw country, which was laid out October 26, 1900 (R. 14). It comprised nearly 160 acres. Subsequently and after the act of 1902 a petition was filed with the Dawes Commission to enlarge the town site and to add to the town site, among other lands, the lands in controversy. The Commission, February 17, 1903 (R. 16), reported to the Secretary of the Interior that residences were on the land and that it was needed for town site purposes. Under the law this addition at this date could have been made by the Secretary of the Interior in his discretion. Prior to the time the commission's recommendation reached the Secretary, however, the Indian appropriation law for the fiscal year beginning July 1, 1903, had been enacted into law on March 3, 1903, and deprived him of his authority to embark on new town site work or to create any new towns or new additions to existing towns (R. 21). Congress by this time had grown impatient at the slow and expensive progress of Indian Territory affairs and by this act it limited appropriations for town site work to projects already under way and remitted any new town site projects to private enterprise under the statutory provisions in prior acts (R. 6, 25). The Secretary of the Interior exercised his discretion, rejected the recommendation of the Dawes Commission, refused to add the land in controversy to the town site by the terms of a letter he wrote to the Dawes Commission, stating that "the department does not

deem it advisable to make the reservation in view of the act of March 3, 1903" (R. 25), and the land in controversy was duly and lawfully thrown open to allotment.

For years Belle Frost had had improvements (consisting of dwellings and an orchard) on the forty acres in controversy. Under the law this gave her a preferential right to select the tract as part of her allotment. The land was duly and regularly appraised, exclusive of improvements, which under the law could not be appraised, at $200 and Belle Frost duly and regularly selected and filed on [illegible] forty acres as part of her allotment. Under the law nine months was given within which to contest the filing of Mrs. Frost. Under the rules and regulations of the Secretary of the Interior where contests are instituted hearings are had and decisions rendered by the Dawes Commission and notice thereof given the parties, with right of appeal within definite periods to the Commissioner of Indian Affairs and thence to the Secretary himself as the final special tribunal. If no contest was filed or no appeal taken in a contest the Dawes Commission, with the knowledge and approval and by direction of the Secretary of the Interior, issued, without forwarding the same to the Secretary, allotment certificates direct to the party filing. In the case of Belle Frost no contest was filed and after nine months a certificate of allotment was duly (R. 4) and lawfully issued to her in the usual routine, describing the lands in controversy and declaring her entitled to the same. Thereafter in accordance with the express terms of the statutes the principal Chief and Governor of the two tribes duly and regularly executed a patent to Mrs. Frost to the lands described in the allotment certificate (R. 4) and stood ready to deliver it to her. The law had provided that

this patent should be recorded. The tribal executives and the individual Indians claimed the right to record, and this right was long insisted on, but the Secretary of the Interior insisted that he should sign and approve the patents and direct their recording. The Cherokee agreement of July 1, 1902, section 59 (32 Stat., 716, 1 Kappler, 787), had provided that all conveyances of land should be approved by the Secretary of the Interior, but no such provision was contained in the Choctaw-Chickasaw agreement. Finally the Choctaws and Chickasaws yielded, the deadlock was broken, and the patents which had accumulated were forwarded to Washington.

In 1905 the Secretary of the Interior, with the same facts before him as in 1903, decided to reverse his former decision, to add to the town site the lands in controversy, directed that the lands be segregated for townsite purposes, that the order throwing them open to allotment be revoked, that the allotment certificate of Mrs. Frost be canceled (R. 16), and refused to record or deliver her the patent executed by the tribal executives. After vainly offering to protect any persons on the tract and having rights thereon, if any, Mrs. Frost demanded the Secretary sign or record her patent, and on refusal filed the pending cause. The basis of the Secretary's adverse action was that (R. 16) parties had given urban occupancy to parts of the land.

By the Atoka agreement of 1897, embodied in the act of June 28, 1898, it was provided that as soon as practicable after completion of allotments the principal chief of the Choctaw and the governor of the Chickasaw nation "shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said

allottees patents conveying to him all the right, title and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land. Said patents shall be framed in accordance with the provisions of this agreement, and shall embrace the land allotted to such patentee and no other land, and the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a relinquishment of all his right, title and interest in and to any and all parts thereof, except the land embraced in said patents, except also his interest in the proceeds of all lands, coal and asphalt herein excepted from allotment.

"That the United States shall provide for proper record of land titles in the territory occupied by the Choctaw and Chickasaw tribes." The act of June 28, 1898, further provided that "the appraisement and allotment (of Choctaw and Chickasaw lands) shall be made under the direction of the Secretary of the Interior."

* * * * * * *

> "That all controversies arising between the members of said tribes as to their right to have certain lands allotted to them shall be settled by the commission making the allotments.
>
> "That the United States shall put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee."

By the Choctaw-Chickasaw agreement of July 1, 1902,

(32 Stats., 641, 1 Kappler, 771), all lands not reserved were thrown open to allotment; preferential right of selection was given to owners of improvements on allotable lands; exclusive jurisdiction was "conferred (section 24) upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of lands; allotment certificates issued (section 23) by the Commission to the Five Civilized Tribes" it was declared "shall be conclusive evidence of the right of the allottee to the tract of land described therein" and the Indian Agent was directed on application of the allottee to place him in possession of his allotment and the Indian Agent in so acting was relieved from control by the writ or process of any court.

By section 66 it was provided that all patents to allotments when executed shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose until Congress should make other provision without expense to the grantee and that these records shall have like effect as other public records; that the provision of the act of June 28, 1898, permitting intruders improving lands to remain until they had obtained a fair return by way of lease for their improvements shall not apply (section 67) to the Choctaws and Chickasaws; that (section 69) all controversies arising between members as to their right to select particular tracts of land shall be determined by the Commission to the Five Civilized Tribes and that (section 71) after the expiration of nine months after the date of original selection of an allotment no contest shall be instituted against such selection.

Argument.

By the pleadings in the case at bar certain admissions are made:

1. That the defendant in error is a duly enrolled Choctaw citizen and was entitled to an allotment.

2. That the fee simple title to the lands was and is in the Indians, the reversionary title of the United States having been surrendered subject only to certain specified reservations and to certain other reservations if made by the Secretary of the Interior for town site or other purposes.

3. That by their express terms the laws applicable require these certain town site and other reservations to be made prior to the lands of the Choctaws and Chickasaws being taken in allotment.

4. That town site and other reservations were made of other lands, including the town site of Mill Creek, but that the Secretary of the Interior refused to reserve the lands in controversy from allotment.

5. That the Secretary of the Interior or the Dawes Commission, which is under his direction, after this refusal threw the lands in controversy open to allotment.

6. That petitioner had improvements on the lands in controversy, had a preferential right to allot the same and lawfully selected the lands as part of her allotment.

7. That for nine months from date of her selection there was given the right of contest of petitioner's claim to allot the lands in controversy.

8. That after this nine months period of limitation petitioner's allotment was confirmed to her, and an allotment certificate to the lands in controversy lawfully issued to her by the Dawes Commission.

9. That this allotment certificate was duly and regularly issued to her by the Commission to the Five Civilized Tribes (R. 4).

10. That under the law no contest can be instituted against an allotment after nine months; that the allotment certificate issued petitioner to the lands in controversy is by law declared in express terms to be "conclusive evidence" of petitioner's right to the land in controversy; that it is by express statute declared to be the duty of the U. S. Indian Agent (a subordinate of the Secretary of the Interior) to place the holder of the allotment certificate in possession of the lands in controversy, and, on demand, to remove any other person therefrom.

11. That by the express terms of the statutes applicable, after allotment certificates are issued by the Commission to the Five Civilized Tribes, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation, under the agreement between the United States and the Choctaw and Chickasaw nations (the owners in fee of the land in trust for the individual communal members) "shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents conveying to him all the right, title and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement."

12. That the chief and governor respectively did execute and were ready to deliver to petitioner patents for the same land allotted to petitioner, being the land in controversy (R. 4).

13. That the Secretary of the Interior months after this refused to permit delivery of the patent to petitioner,

took possession thereof and directed cancellation of the patent.

14. That it is not claimed there is any express authority authorizing the Secretary of the Interior to refuse delivery of the patent aforesaid, but the authority is claimed solely by implication and under the general power of administration of Indian Territory affairs.

15. That as to enrollment, leases and other items of administration, it is by express provision declared they shall be valid only after approval by the Secretary, but that no such requirement exists as to Choctaw patents.

16. That the Secretary claims the right to cancel and annul the patent in this case on the ground that prior to petitioner's selection as her allotment of the lands covered by the patent settlement had been made on part of said lands by persons who had erected improvements thereon for urban occupancy and that he has a general superintending power over lands in the Indian Territory. No facts showing any right thereon or that they were citizens of the Choctaw nation are averred.

17. That no claim is made that these facts were not well known to the Secretary when he made his first decision, but the fact that the land was under urban occupancy it is expressly averred by the answer was in fact well known to him when he refused to segregate the land as an addition to the town site of Mill Creek and threw the same open to allotment. That the law at one time did vest in the Secretary the jurisdiction and discretion to segregate land for town site purposes or not and open lands to allotment. That petitioner did not act fraudulently or wrongfully in any wise nor violate any law or regulation in selecting the land in allotment.

18. That at the time these proceedings arose there was

no town site commission and no funds for segregation of lands for town site purposes and that Congress had made other provisions with reference to town sites and had limited the Secretary's power and authority as to town sites to completion of town site work begun and had made no provision for initiation by the Secretary of new town site projects but had remitted this to private enterprise.

19. That petitioner will suffer loss and will not receive full compensation for her land and improvements if the patent be not issued to her.

THE SECRETARY OF THE INTERIOR HAVING REFUSED TO ADD THE LAND IN CONTROVERSY TO THE TOWN SITE OF MILL CREEK AND THAT BEING WITHIN HIS DISCRETION HIS DECISION IS NOT OPEN TO REVIEW. BUT HAVING ACTED HE THEREAFTER COULD NOT REVERSE HIMSELF SUBSEQUENT TO MRS. FROST'S ACQUIRING A SOLE INDEFEASIBLE RIGHT IN THE LAND.

The Secretary of the Interior having decided that the land in controversy should not be reserved from allotment for town site addition purposes and that it should be thrown open to allotment and the law having created him a special tribunal for the determination of this matter, his decision was unassailable and made an end of all controversy as to this matter. It could not be assailed by a member of either the Indian Nations, who, as owners of the entire fee of the whole land of the nations, subject to special reservations for special purposes, had the greatest interest in the matter or by an occupant of the land; it could not be revoked or annulled by a succeeding

Secretary and a fortiori by the Secretary who originally decided, provided private rights meanwhile had sprung into being. It exhausted judgment, discretion and controversy.

> Linn *vs.* Belcher, 24 How. (U. S.), 526.
> Steel *vs.* St. Louis Smelting Co., 106 U. S., 228.
> Johnson *vs.* Towsley, 13 Wall., 83.
> Noble *vs.* Union River Logging Co., 147 U. S., 170.

The land having been thrown open to allotment and petitioner having lawfully allotted the same, and in due and orderly course of administration the special tribunal charged with allotment of the tribal lands in severalty, having declared defendant in error entitled to the same and issued an allotment certificate to her as conclusive evidence of her private and personal right to the land she acquired a vested interest therein, of which she cannot be deprived by the Secretary of the Interior or any other tribunal save a court of equity, for good cause and in accordance with settled procedure in equity.

> U. S. *vs.* Schurz, 102 U. S., 169.
> Noble *vs.* Union River Logging Co., *supra.*
> Wallace *vs.* Adams, 143 Fed. Rep., 716.
> Cornelius *vs.* Kessel, 128 U. S., 456.

In the case at bar the rights of defendant in error are unusually strong and clear. She was a member of the Choctaw and Chickasaw nations and, as such, an owner of an undivided interest in fee in all its lands, subject only to a very remote reversionary interest. As a contracting party she agreed to relinquish her right in the whole to the extent of certain special charitable, school and town

site reservations, and subject as to the last to the exercise in a prescribed mode and within a certain period of this right of reservation. This was a gift or grant by her. It had its strict limitations. It was not an unlimited grant. It must be strictly construed and applied. By its very terms the Secretary of the Interior was required to decide on each town site reservation and to decide prior to allotment. Having decided against adding the land to the town site and having thrown the land open to allotment his discretion and jurisdiction were exhausted once the lands were filed on.

It is an elementary rule of statutory construction that words must be given their ordinary meaning and that while in cases of ambiguity words may be interpolated, transposed or eliminated, this shall not be done where the words used are apt, plain and sensible; likewise that legislation by implication is not favored and especially where the language used is explicit.

Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject-matter but he must also keep within the limits of the power conferred on him by statute. Where the statute defines he cannot under the name of administration *make* law.

U. S. *vs.* Thurber, 28 Fed., 56.
U. S. *vs.* McDaniel, 7 Pet., 1-14.

The primary question is not quite as stated by the plaintiff in error "when does the supervising administrative power of the Secretary of the Interior cease?" The question is not what supervising administrative power the

Secretary might have retained over the land in controversy, but is, "Had the supervising administrative power of the Secretary ceased and determined when, acting under his directions and the law, rules and regulations and practice prescribed or followed by the Secretary of the Interior, the Commissioner to the Five Civilized Tribes duly allotted the land to petitioner and duly issued an allotment certificate to her, later followed up by execution of a tribal patent."

AFTER ISSUANCE OF THE ALLOTMENT CERTIFICATE THE ISSUANCE OF A PATENT AS A MORE FORMAL MUNIMENT OR EVIDENCE OF TITLE WAS BUT A MINISTERIAL ACT, PERFORMANCE OF WHICH WILL BE COERCED.

Under the statutes the utmost that the Secretary of the Interior can be held to have lawful power to do after an allotment certificate is issued by the Dawes Commission under his direction, is to see that the patent signed by the heads of the two Indian nations conforms to the allotment certificate description and is recorded. Neither expressly nor impliedly has he power to cancel. That is a judicial act. U. S. *vs.* Stone, 2 Wall. (U. S.), 535. The Secretary's function after allotment, if any, was ministerial. Even if the opinion of the Attorney-General, in 25 Opns. Atty.-Gen., be correct it does not go beyond this.

A ministerial act may be defined to be one which a person performs upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of doing the act. The act

is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act.

Flournoy *vs.* Jeffersonville, 17 Ind., 169.
Crane *vs.* Camp, 12 Conn., 463.

In Roberts *vs.* U. S. ex rel. Valentine, 176 U. S., 221, this Court said:

> "We think construction of the act of Congress is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within the meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once plain, imperative and entirely ministerial.
>
> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him and which, upon the facts existing, he is bound to perform, then that act is ministerial, although de-

pending upon a statute which requires, in some degree, a construction of its language by the officer; unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

In West *vs.* Hitchcock, 19 App. D. C., 333, that Court said:

"To grant a patent for lands or for an invention is a quasi-judicial function of the highest nature, which has been committed by Congress to the executive officers of the Government; and the granting or refusal of such a patent ordinarily cannot be questioned in the courts. But when all the proper prerequisites have been complied with, and all the preliminary steps have been taken whereby a party has in law become entitled to a patent, and nothing remains to be done but to issue the patent, it is well settled that such patent may not then arbitrarily and without just cause be withheld, and that its execution and delivery may be enforced by the writ of mandamus, citing Butterworth *vs.* Hoe, 112 U. S., 50; U. S. *vs.* Schurz, 102 U. S., 378; Dunlap *vs.* Black, 128

> U. S., 40. It has been well said that under our representative system of government there is no place for the exercise of arbitrary power. * * * The only ground whatever of objection set up to the writ is that the case is one involving the exercise of judgment and discretion on the part of the Secretary. But the plain answer to this argument is that the judgment and discretion have been exercised, and that the only thing which now remains to be done is the final expression of that judgment, as in the case of Butterworth *vs.* Hoe, *supra*, by the execution and delivery of a certificate of approval, which, in contemplation of law, is a purely ministerial duty."

In Barney *vs.* Dolph, 97 U. S., 397, this court said: When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. We so decided in Stark *vs.* Starr, 73 U. S. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured was, as to the government, a transfer of the ownership of the land.

See Frasher *vs.* O'Connor, 115 U. S., 315.

THE ALLOTMENT CERTIFICATE IS DECLARED BY STATUTE TO BE "CONCLUSIVE EVIDENCE" OF THE HOLDER'S RIGHT TO THE LAND. IT COMPRISES AN ADJUDICATION AND CONVEYANCE OF THE ALLOTTEE'S RIGHT TO THE LAND.

Mrs. Frost's right became complete upon the issuance to her of an allotment certificate. That certificate was made by statute "conclusive evidence" of her right to the

land; Secretary Hitchcock's administrative officer, the United States Indian Agent, was directed summarily and if necessary forcibly to see she was put in possession of her rights, and it was declared that from the date when her right to it accrued after selection of her allotment (nine months) no contest should be heard against her right to the allotment. As other persons cannot directly assail her title neither can they indirectly do this through the Secretary (barring, as we shall see later, a court of equity's power in cases of fraud, mistake, etc.). That nine months period is in effect a statute of limitations so far as concerns the executive department. If one of the parties entitled to an interest in this land cannot contest Belle Frost's rights, by virtue of what statute can the Department of the Interior contest it? If any Choctaw after nine months cannot contest directly, how can a Choctaw citizen, or still more, a white urban squatter, lawfully be permitted to do so indirectly by ex parte representations and influence on the Secretary of the Interior?

In Hugh Wallace et al. *vs.* Ella Adams et al., the U. S. Circuit Court of Appeals for the Eighth Circuit recently found it necessary to decide that case to determine when an allotment became a vested right of the selector or allottee. It said in this opinion, 143 Fed. Rep., 720 (affirmed in 204 U. S., 415, but without discussion of the lower court's remarks here quoted):

> "By the act of July 1, 1902, exclusive jurisdiction had been conferred on the Dawes Commission to determine under the direction of the Secretary of the Interior all matters relating to the allotment of land and to issue allotment certificates which should be conclusive evidence of

the right of the allottee to the land therein described, and authority was given to the Indian Agent at Union Agency to place allottees in possession of their lands upon application to him free from the writ or process of any court. * * * The Commission, under the direction of the Secretary, constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands, and to execute its judgments by the issue of the *allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property.* This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an *adjudication* of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a *conveyance* of the right to this title to the allottee. U. S. *vs.* Winona and St. Peter R. Co., 67 Fed., 984-55. * * *

"The lands in controversy here have been allotted to the plaintiffs below. They are no longer the property of the tribes. * * *

"Congress necessarily had the authority under the Constitution *at any time before an allotment of lands* under its previous acts had been finally made to the defendant and his right to the land *had thereby become vested*, to repeal its previous legislation, &c. * * * The entire question (as to who were entitled to citizenship) still remained subject to a Congressional action and the *legislative department* had the same power *at any time before allotments were made and the rights* of the *allottees became vested*, to disregard or to authorize a review of the decisions of these courts by other tribunals," &c.

And throughout the opinion it will be found that the court repeatedly iterated its settled conviction that after allotment rights became vested they were beyond executive control. The learned counsel for the government have attempted to cry down this opinion as but obiter with respect to allotment certificates. But the opinion was by the highest court in the section affected; the opinion shows the matter was carefully considered and moreover consideration of the point was necessary to the court's conclusion, and, if necessary, it is not abiter under the authorities.

Justice Wright, in the court of first instance, in a brief but very apt opinion, tersely stated the matter in saying *that before* but not *after* issuance of an allotment certificate the Secretary had jurisdiction and discretion over allotments.

The case at bar is very similar in general to that of Stark *vs.* Starr, 73 U. S. The patent to Stark contained a reservation in favor of the city of Portland as to rights the city might have. The court said: "If the town site act was not in force in Oregon before the right of Stark to a patent of his donation claim became perfected the reservation of the patent was inoperative and void. That right became perfected when the certificate of the Surveyor-General and accompanying proofs were received by the Commissioner of the General Land Office, and he found no valid objection to them. That is to say, if the Donation Act of 1850 was applicable to the lands, his right to a patent became perfect when the certificate of the surveyor and accompanying proof showed, in the judgment of the commissioner, a compliance with its requirements. * * * His objection to the patent arose, not from any defect in the certificate or proof, but from

an opinion that the lands were subject to the provisions of the Town Site Act of 1844. That he was mistaken in this opinion we are entirely satisfied.

* * * * * *

Before the passage of the act of 1844 the claim of the defendant Stark had been surveyed and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued."

THE SECRETARY'S REFUSAL TO RESERVE THE LANDS NECESSARILY MADE THEM ALLOTABLE ONLY BEFORE ALLOTMENT COULD TOWN SITE RESERVATIONS BE MADE.

Before Secretary Hitchcock, in October, 1905, attempted to cancel Belle Frost's allotment certificate and to refuse to record her executed patent to the lands he had refused to reserve the lands for town site purposes and by that very act (Rec., pp. 3, 4 and 16, section 8, Choctaw agreement approved July 1, 1902) the lands became at once "allotable lands," and were so treated by the Dawes Commission and the Interior Department (both treating and acting on the Secretary's letter declaring it inexpedient or inadvisable to add the lands in controversy to the town site of Mill Creek as a refusal to reserve the land and this contemporaneous construction continuing till the exigencies of the case at bar drove counsel for the plaintiff to quibbling over the matter,

see West *vs.* Hitchcock, 205 U. S., 80); the same had been selected in due and regular course in private right by Belle Frost; she had proved her right thereto; that right had been determined to be hers and under the direction of the Secretary of the Interior whose rules, custom and practice as well as the law directed the Dawes Commission to issue allotment certificates to enrolled citizens without reference to him where no contest was instituted within the statutory period, "conclusive evidence" of her right had been issued to her by the Dawes Commission and such steps taken as to perfect her patent. Nothing remained but recording. In the Cherokee, Creek and Seminole Nations the Secretary's approval is needed to conveyances. See Cherokee agreement, section 59, approved July 1, 1902 (32 Stat., 716, 1 Kappler, 787) and Creek agreement, section 23, approved March 8, 1900 (31 Stat., 861, 1 Kappler, 729), and Seminole agreement December 16, 1897 (30 Stat., 567, 1 Kappler, 662). Not so in the Choctaw Nation. There the agreements entered into by the Choctaws and Chickasaws specifically, explicitly and in plain, unambiguous language left execution and delivery of patent wholly to the tribal executives. The Choctaw and Chickasaw titles to their lands it may be said differ in material respects from those of the other nations. As all these agreements were made by the one body for the United States, namely, the Commission to the Five Civilized Tribes or Dawes Commission, and were made substantially at the same period of time, the omission in the Choctaw-Chickasaw agreement is significant. It is matter of history that the Choctaws and Chickasaw commissioners and their attorneys combatted the government commissioners and carried their contention that the approval of the Secretary of the Interior was not necessary to give Choctaw and Chickasaws full title and that

there was no interest remaining in the United States to be parted with and its transfer evidenced. What was done by the Choctaws and Chickasaws as to reserving town sites created before allotment and land needed for charitable institutions from allotment was by way of gift or grant. Its limitations are to be strictly construed and against the grantee.

R. R. Co. *vs.* Litchfield, 23 How., 66.

But "if it were a *casus omissus* on the part of Congress this court has no power to supply the omission."—Crilly *vs.* Burrows, 17 Wall., 167.

After Secretary Hitchcock refused to assent to and turned down the recommendation of the Dawes Commission in 1903 to add the lands in controversy to Mill Creek, the lands became allotable lands, and after Mrs. Frost thereupon had filed on the same and acquired a private right therein the lands ceased to be open to a change of mind on the Secretary's part and ceased to be open to government town site segregation, even had not the Secretary's town site powers been taken from him by Act of Congress and town site work closed out. It was then too late. And especially should this in fairness be the case, for two years in a growing, developing new country makes great changes and inevitably any judgment based on conditions and appearances and character of an outlying suburb of a town in 1905 would not be true of its character in 1903. Hindsight and foresight, never companions, travel in opposite ways at express train speed in the new West.

The instant case is substantially, in legal principle, on all fours with Noble *vs.* Union River Logging R. Co., 147 U. S., 165. In that case the court exhaustively dis-

cussed the functions, administrative and otherwise, of the Interior Department, citing among other cases French *vs.* Fyan, 93 U. S., 169. In the logging company case it became the duty of the Secretary to determine whether the facts as to a certain railway brought it within a certain class and whether he should approve the profile of the road. He acted; he decided. It was claimed he had wrongly acted because of misrepresentation of facts but notwithstanding this element of fraud which is lacking in the instant case the court decided that rights had vested and could not be taken away save by a direct proceeding instituted for that purpose.

The learned counsel for the Secretary has attempted to bolster his position by a citation of an opinion of the Attorney-General, 25 Opin. Atty.-Gen., 460, on the subject of recordation of Choctaw and Chickasaw patents and has claimed that opinion is controlling on the courts in construction and interpretation of the law. But, in the first place, the authorities are cases of settled and long-acquiesced in constructions and interpretations, and that is not the fact as to Choctaw patents, and second, the authorities apply only where the statute is ambiguous. Here the statute is plain and clear. "It is only in cases of *doubt* that the construction given to an act by the department charged with the duty of enforcing it becomes material."—U. S. *vs.* Tanner, 147 U. S., 661; Robertson *vs.* Downing, 127 U. S., 607.

And moreover, the question before the Attorney-General was simply whether, in order to assure a recording of all patents, the Secretary of the Interior could insist that the patents be sent to him for that duty and not whether when that stage was reached he could revoke one decision and announce a second and contrary decision as to a par-

ticular town site reservation (after it may be said incidentally Congress had ended his town site powers and work), cancel an allotment duly made and take from the allottee her land.

In U. S. *vs.* Stone, 2 Wall. (U. S.), 535, held: The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the Land Office is not competent to cancel or annul the act of his predecessor, likewise he cannot annul his own lawful acts. This is a judicial act and requires the judgment of a court. * * * A patent is the highest *evidence of title*, and is conclusive as against the government and all claiming under junior patents or titles until it is set aside or annulled by some judicial tribunal.

The Secretary of the Interior claimed the right before the Attorney-General to affix his signature to patents after they have been signed by the Chief and Governor of the Choctaw and Chickasaw Nations respectively, in order to see the description corresponds with the allotment certificate, and that the patents were actually recorded in the Interior Department records here and the appropriate offices in the Indian Territory. The head of her nation having assented reluctantly to this mode of procedure, petitioner has no objection, but all that is to be done, if anything can be lawfully done by the Secretary, is purely ministerial.

> "It is the character of the act to be done that determines whether it is ministerial."
>
> State *vs.* Staub, 61 Conn., 567.
>
> Butterworth *vs.* Hoe, 112 U. S., 50.
>
> U. S. *vs.* Schurz, 102 U. S.

THE ALLOTMENT CERTIFICATE HAVING VESTED RIGHTS SOLELY AND INDEFEASIBLY IN MRS. FROST, ISSUANCE AND DELIVERY OF PATENT ARE ESSENTIALLY MINISTERIAL.

Defendant in error's rights having vested (vide Wallace *vs.* Adams and Noble *vs.* Logging Co.) with the issuance of the allotment certificate to her, all that remains is merely ministerial, whether it be the simple recording and delivery of the certificate or the comparison of the description in the allotment certificate with the description in the patent signed by the heads of the Choctaw and Chickasaw Nations, its then countersignature by the Secretary of the Interior, recording and delivery. The ministerial character of the act can be seen from the following provision inserted, after the Choctaw's reluctant acquiescence in the Secretary's insistence on his right to record the patents after they had signed, in the Indian Appropriation Act, approved February 25, 1903 (32 Stat. at Large, 854-91): "For pay of one clerk, to be appointed by the Secretary of the Interior, to sign, under the direction of the Secretary, in his name and for him, his approval of all tribal deeds to allottees and deeds for town lots made and executed according to law for any of the Five Civilized Tribes of Indians in the Indian Territory, $1,200, to be immediately available."

The sole reason for sending the Choctaw and Chickasaw patents to Washington was in order to assure recordation, it being feared some allottees would not record their patents. Incidentally it may be said the statutory legislation is different in all the other tribes from that provided in the agreement betweeen the United States and the Choctaws and Chickasaws. A perusal of the statutes furthermore will show that as to leases, enrollments, &c.,

they all provide explicitly that they shall be valid only after approval by the Secretary, while as to allotments in the Choctaw Nation the final discretion ceases with the issuance of allotment certificates, and frequently alienation is made to date from date of the allotment certificate. It is only by interpolation of words and grant thereby of power not contained in an act plain and sensible without interpolation, and wherein, moreover, the same act in relation to other matters does confer discretion on the Secretary, that it can be held he has any discretion as to patents.

Defendant selected her allotment in accordance with and strict observance of the law and the rules and regulations of the Secretary of the Interior then in force.

The Secretary cannot by new rules or new special action taken subsequent to her acquisition of rights deprive her of that to which she became entitled.

James *vs.* Germania Iron Co., 107 Fed., 597.

Counsel for plaintiff in his brief has made frequent reference to decisions wherein it has been held review may be made by the Secretary prior to actual issuance of patent where justice or equity or good administration he discovers demands it. Counsel for defendant admit the applicability of these decisions in proper cases and under proper statutes. But, as stated by the Supreme Court in Butterworth *vs.* U. S., 112 U. S., 50, "each case must be governed by its own text, upon a full view of all the statutory provisions intended to express the meaning of the legislature." The present situation is more nearly analogous to that of Lytle *vs.* State of Arkansas, 9 How. (U. S.) and Noble *vs.* Logging Co., *supra*, than to the cases cited by counsel for plaintiff.

In Lytle *vs.* State of Arkansas, supra, the act of May 29, 1830 (4 Stat. at Large, 420.) provided that occupants of public lands might make preemption entries to the same, provided that proof of settlement or improvement be made to the satisfaction of the register and receiver of the land district in which the lands may lie, agreeably to the rules prescribed by the Commissioner of the General Land Office for that purpose.

The Supreme Court held that under this statute "the register and receiver were constituted, by the act, a tribunal to determine the rights of those who claimed preemptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final."

Similarly under the existing law the Dawes Commission was constituted the tribunal to determine controversies as to allotments and to issue allotment certificates, and the allotment certificates when issued were expressly enacted to be "conclusive evidence" of the allottee's rights.

July 4, 1836, Congress passed a new public land law (5 Stat. at L., 106) which without repealing the law of 1830, provided: "That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the

General Land Office, under the direction of the President of the United States."

This section is substantially the present law except that the Secretary of the Interior succeeds the President.

In Orchard *vs.* Alexander, 157 U. S., the Supreme Court says that the adjudication of the register and receiver "was final when no supervising power was by statute vested in the Commissioner of the General Land Office" referring to the situation in the time of Lytle *vs.* Arkansas. It further said: "If the section declaring that proof in respect to settlement and improvement should be made to the satisfaction of the local land officers, stood alone, as it formerly did, it might well be contended that as the local land officers were the ones to whose determination the question of settlement and improvement was confided, and as there was no statute granting any review of their determinations, they must be taken as final. It was of course, competent for Congress to give finality to their determination, and having given them the power to determine, and made no provision for any review, it naturally followed that their determination was final."

Counsel for plaintiff in error has attempted to compare the allotment of these Indian lands to a homestead or preemption entry under the present land laws. Like all arguments by way of analogy there is danger of misleading. The statutes are in no wise similar, and the conditions are in no wise similar. In the public land laws Congress is giving away the public domain, and the rule there is that every fair presumption and intendment shall be made in favor of the grantor and against the grantee. In the instant case the Indian is the owner in part of the tribal domain, and when a claim is made that part of that

tribal domain was by him or her given away and renunciation made by the Indian of his or her right to take the same in allotment, then the rule of interpretation requires nothing shall be taken for granted against the Indian grantor, and that all lands shall be open to division in severalty or allotment save such lands as are reserved by express statute or clear implication.

If analogies are to be resorted to then we submit closer analogies will be furnished by Noble *vs.* Union River Logging Co., *supra*, and other cases of grants of land upon approval of maps filed than by cases under the general public land laws.

In Deseret Land Co. *vs.* Tarpey, 142 U. S., 241, the Central Pacific R. R. Co., through whom Tarpey derived his title, had filed its map of definite location in the Interior Department and the same had been accepted. The Land Grant Act provided "that there be and hereby is granted" to the company every alternate section of public lands to which other rights "may not have attached, at the time the line of said road is definitely fixed." It further provided that whenever the company shall have completed twenty consecutive miles the President shall appoint three commissioners to report to him in relation thereto, "and if it shall appear to him that not less than twenty consecutive miles of said railroad line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company."

In this court it was contended by Tarpey that upon the filing of the map of definite location of the road and its acceptance by the Secretary of the Interior a legal title

vested in the grantee subject to possibility of forfeiture while in behalf of the Deseret Company it was insisted that the grant gave only a promise of a title when the work was completed, and that until then possession of the lands could not be claimed.

This court, considering the question there involved of pertinence to the present suit said: "The question naturally arises as to the necessity for patents, if the title passed by the act itself upon the definite location of the road. We answer that objection by saying that there are many reasons why the issue of patents would be of great service to the patentees, and by repeating substantially what we said on that subject in Wisconsin Cent. R. Co. *vs.* Price, 133 U. S., 496, 510. While not essential to transfer the legal right the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. * * * There are many instances in the reports where patents have been required and issued, although the title of the patentee had been previously recognized and confirmed. * * * In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

See also Curtner *vs.* U. S., 149 U. S., 662.

THERE IS A PLAIN DISTINCTION BETWEEN AN INDIAN ALLOTMENT CERTIFICATE AND A PUBLIC LAND RECEIVER'S CERTIFICATE.

There is a distinction between an allotment certificate and a receiver's certificate in a public land case. The latter under the express statute (Guaranty Savings Bank *vs.* Bladow, 176 U. S., 448), is reviewable by the Secretary of the Interior and the Commissioner of the General Land Office. The receiver's certificate "does not transfer the title to the land from the United States to the entryman, and it simply furnishes *prima facie* evidence of an equitable claim upon the government for a patent, and the use of the certificate for that purpose is subject to be destroyed by the cancellation thereof under direction of the department. "This is the legal effect," quoting Guar. Sav. Bk. *vs.* Bladow, *supra*, "of such certificates, and all who deal in them or found any right upon them must be held to do so with full knowledge of the character of such papers."

The allotment certificate, on the other hand, is expressly made "conclusive evidence" of the allottee's right to the land. It is issued only after proceedings before the Secretary resulting in the allottee's final enrollment, which final enrollment was a determination that the allottee was entitled to an equal and separate distributable portion of the tribal communal holdings; and likewise only after the enrolled tribal member had selected out of the communal holdings in which he had an, as yet, undivided interest, and out of those communal holdings which the Secretary of the Interior had decided were not reserved for special reason from allotment, the part he desired for his own individual share, and after a nine months opportunity or statute of limitations within which

any persons claiming superior equities or preferential rights to the allottee might file contest against the allottee's selection, and after a determination by the Dawes Commission, to which commission Congress expressly delegated jurisdiction over allotments and controversies between allottees (section 69 of Choctaw-Chickasaw agreement of July 1, 1902), that the allottee was entitled of right and under the law and rules and regulations issued thereunder, to the land he had selected in allotment. It gave the allottee a vested right to the part he had segregated from the ancestral communal home and property of his tribe (vide Wallace *vs.* Adams, *supra*). Thereupon he became entitled to a patent. The allotment certificate issued to the allottee under section 23 of the act of July 1, 1902, by the Dawes Commission, was the final and conclusive evidence of the United States that the lands described in the allotment certificate were not reserved by the United States from allotment, that no other tribal member had right to the land in question and that the allottee was the lawful owner of the land in severalty. Then followed the patent. This under the express statute proceeded from the holder of the fee in the land and of the patent to said fee, the Choctaw and Chickasaw tribes or nations, through their responsible official heads, the Chief or Governor of the nations respectively. The patent properly and, as matter of course, came from the owners and holders of the entire patent (see sections 4 and 5 of petition), who being Indians left to the named government officials the determination of who should receive the same. The signing of the patent was compulsory on the heads of the nations. They did sign the patent of petitioner. All that remained under the provisions of the law after execution was recordation (section 66, Choctaw-Chickasaw agreement of July 1, 1902).

Because of this provision that the patents should be recorded the Secretary of the Interior assumed that this duty should be performed by him. If it be his duty it is a purely ministerial duty (as the character of the act evidences (State *vs.* Staub., 61 Conn., 567) and does not justify interference with rights in the allotment. And if the assumption of this duty by the Secretary be but administrative usurpation, mandamus likewise should follow. Having determined he should see to the recordation the Secretary decided, although the law nowhere confers any such power and the statute being complete and dealing with the subject as an entirety should be held complete and leave no room for implication, that he should sign the patents as well as the heads of the Indian nations. The latter demurred, but, true to Indian nature, yielded under insistence of the Secretary. Thus it occurred the patent of petitioner came into his hands and it was at this stage he sought to take away her acquired rights. The statement of the proposition we deem would be sufficient were there no authorities. And the precedents are numerous, first, that no such function can be acquired by implication, especially where the Congress has legislated on the entire subject, and secondly, that if it could be held to exist the function is purely ministerial, and if not exercised will be compelled by mandamus.

THE RIGHTS, CONSEQUENT UPON HAVING AN ALLOTMENT CERTIFICATE AND A COMPARISON OF THE ACTS OF 1898 AND 1902, SHOW THE INTENT OF CONGRESS.

After receiving an allotment certificate the lands were devisable by will, descendible by inheritance and saleable and transferable. Their rights were even greater than

those of settlers in Oregon in the early days, for their claim was founded on partition to them of their share of the common tribal estate after determination of the fact that they were tribal members and that no other person had or claimed right to the particular tract described in the allotment certificate; and in Barney *vs.* Dolph., 97 U. S., *supra*, the court held that after a husband and wife had perfected their right to a patent for lands in Oregon they could, before receiving the patent, sell and convey the lands so as to cut off the rights of the children or heirs of the husband or wife, in case of his or her death before the patent was actually issued. Further after receiving an allotment certificate the Secretary permits the allottee to lease his lands for oil, gas and coal, to appropriate things not his if not entitled to the lands and to share the same on a royalty basis with strangers to the land and the nation.

Is it conceivable that Congress intended that lands to which the parties' rights were not yet complete might be sold by him and that purchasers thereof would take the same with notice that their titles might be cut off at the fountain head by a change of mind on the part of the Secretary of the Interior? Is it possible Congress would permit an allottee holding an allotment certificate to lease his land for oil purposes; to receive the royalty and his lessee the oil while yet there remained in the Secretary the discretion to change his mind, cancel the allotment certificate and issue patent to another party, who meanwhile would have been deprived of the royalties or oil taken by or under the direction of the allotment certificate holder?

Is it consistent with a party having a sole and indefeasible right to a particular tract of land that there remains in the Secretary of the Interior, an officer having

no judicial power to declare a forfeiture, the authority to declare in effect a forfeiture of the rights of the allotment certificate holder by cancelling his certificate and refusing him a patent?

This court has said that even in cases of doubt on its part it will follow the decisions of the highest courts of the State of the situs of the land on a question of real estate titles. While the court may not go so far where a federal statute and Indian lands are concerned, we believe the decisions of the highest court of the State where the land lies will be treated with great respect.

In Godfrey *vs.* Iowa Land & Trust Co., 95 Pac., 792, the Supreme Court of Oklahoma had under consideration the question whether or not a citizen of the Seminole Nation after selecting his allotment and receiving his certificate of allotment, and after the removal of the restrictions on the alienation of the allotted land, could validly convey his right to the allotment in advance of the issuance of a patent for the land. The court held that the party had a full right of sale after the allotment certificate was issued. It said that obviously at this time the land had been segregated from the common mass of tribal land, and the party had a personal, individual right therein. Quoting Witherspoon *vs.* Duncan, 71 U. S., 210, it said that from the time the particular land was segregated from the mass of public lands and became private property there was a right of sale. It was plain that after the issuance of the allotment certificate the party's rights to the land became sole and indefeasible, and since his restrictions (as an Indian) had been removed he would have the right of sale of that to which he had the sole right of occupancy.

In McWilliams Investment Co. *vs.* Livingston, 98 Pac.

Rep., 914, the court considered the question whether a party who had selected his segregated allotment could sell in advance even of an allotment certificate, and it held: "In our judgment the date of the right to alienate or transfer on the part of the allottee subsequent to April 21, 1904, related solely to the time when such allottee actually made or selected his allotment, and when he had done the things necessary to secure an equitable interest or title therein entitling him to a patent."

That Congress had intended to hasten the day when Indian Territory would be fitted for statehood as was declared in 1893 to be its primary purpose, and as a means to that end in its later legislation purposely provided that title should vest with the allotment certificate, we submit, is plain from a comparison of the acts of 1898 and 1902. By the act of 1898 no land could be alienated because its express terms made neither enrollments nor allotments complete until the work was complete as to an entire tribe, when the Secretary's approval would concern the same. The act of 1902 was a complete right-about-face; an absolute change of policy. It provided for enrollments and allotments *pro tanto*—that Indians should be placed on final rolls as rapidly as their citizenship cases could be passed on, and that allotments should be made them individually as fast as could be done consistently with the rights of others and that as soon as any Indian's title to a segregated tract was established by decision of a contest as to the land or a failure to contest for nine months an allotment certificate should issue, to be followed as matter of course by a patent.

The plaintiff in error contends that because section 24 of the act of 1902 gives to the commission exclusive jurisdiction *under the direction* of the Secretary of the

Interior of all matters relating to the allotment of land, therefore the Secretary's power to cancel the allotment certificate and issue a patent is still in him in the instant case, inasmuch as he (the Secretary) had never approved the Belle Frost allotment certificate. But we submit the words "under the direction of" does not mean the Secretary must personally approve each allotment. As counsel understand the phrase it means that the Secretary was empowered to make rules, regulations and orders regarding allotment matters. He could have required report to him of all selections of lands by prospective allottees, and that no allotment certificates should issue even in the absence of a contest without he approved the same, *but he did not*. He left that class of case to the Dawes Commission. As to this particular 40 acres the Dawes Commission had his *direction* when he refused to add it to the town site of Mill Creek. Our contention is that the Secretary of the Interior can *direct* the Commissioner to the Five Civilized Tribes, but that after the Secretary has *directed* him and the Commissioner *has acted* under the *direction* that the Secretary cannot change *the accomplished fact* and forfeit, cancel or annul the vested right acquired pursuant to commands or practice the Secretary has given expressly or sanctioned by permitting without rebuke or contrary orders.

The remarks in the brief of the plaintiff in error to the effect that it was the Secretary's duty to see that Mrs. Frost did not get land of greater value than any other citizen, and that she is without right to the 40 acres because, being adjacent to Mill Creek, it is worth more than other forties, we submit, are deserving of no consideration. The act of 1902 expressly repealed the act of 1898 in so far as "location" was made one of the items of consideration in determining the value of land in order to give each Choc-

taw 320 acres of average allotable land. If Mrs. Frost's 40 acres, therefore, by reason of being near a railroad and town, will sell for more than 40 acres of similar soil further away, that is her good fortune, but it is no concern of the plaintiff in error. He must fix the value and make his measures by the law. There are thousands of cases where Indians have secured lands underlaid with oil, and hundreds where near towns, and in both classes of cases of very large pecuniary value, but counsel is fully aware this clouds not in the slightest degree the lawful right of the allottees. Congress was partiting in kind on a certain basis; it was not engaging in socialism.

Suppose that *after* patent has issued it develops there are or there have been urban dwellings on a tract of land patented to an allottee, the land never having been reserved from allotment, what warrant of law is there for a suit in equity to set aside the patent on the ground that the Secretary of the Interior ought to have reserved this tract of land from allotment and from acquisition of the same as the allottee's individual share of the tribal domain for town site purposes, and that he now is of opinion he erred as matter of judgment in not so doing, and that the non-citizens should be sold the lands as town lots by the United States Government instead of having to purchase the same or acquire rights therein from the Indian allottee; and if this be true after patent, why, if the allotment certificate confers a vested right and gives solely and indefeasibly to the allottee his selected and segregated tract, is it not true after issuance of the allotment certificate?

The act of 1898 reserved from allotment only town site land of towns actually in existence prior to the act. The act of 1900 provided for reservations of land for pros-

pective towns, and it is admittedly under this act the town site of Mill Creek was laid out. There is no legal justification for raising for the first time in this court the point that while the original town site was created under the act of 1900, the establishment of the town under that act at once put on guard any person claiming or having improvements on land adjoining the newly created town that these lands were *ipso facto* reserved from allotment because some squatters might overflow from the 155 acres comprising the newly created town to land adjoining the same and that they could not acquire rights therein, of which they could not be departmentally divested, even after a decision by the Secretary of the Interior that the lands allotted should not be added to the original Mill Creek town site. The argument we submit resolves itself into an absurdity. Reduced to its ultimate analysis it means no Indian citizen could select as his individual patrimony land near or adjacent to a town, and especially a growing town. All that would be necessary to prevent its being allotable land would be for some squatters to erect shacks thereon. The squatter and not the Indian would be the preferred and chosen people. The squatter would make the town site and not the proper officials. The Indian would be held to have granted away and withheld from allotment all lands that at any time might be occupied for town purposes and not simply such lands as *before allotment* might be officially reserved as declared town sites.

Counsel has not noticed the Williams case from the State of Nevada, because it is a pure case of a gross outrageous fraud, attempted to be perpetrated by means of juggling between two land statutes relating to the United States, the State of Nevada nor the Hyu-tse-mil-

kin case, both cited by plaintiff in error, because the most casual examination of the same will show them not apposite to the present controversy.

AS MATTER OF LAW THE SECRETARY COULD NOT RESERVE THE LAND FROM ALLOTMENT BECAUSE HIS TOWN SITE AUTHORITY HAD BEEN REPEALED.

The matter of whether or not the Secretary originally acted wisely and, considering the act of March 3, 1903, advisedly or not in refusing to add the land in controversy to the town site of Mill Creek instead of declaring it open to allotment is not material or essential to petitioner's case, since under the law and the Choctaw tribal agreements the Secretary of the Interior was vested with discretion to locate town sites and to declare what land should be reserved for town sites and what thrown open to allotment as not so needed, and it therefore is not open to judicial inquiry whether as matter of fact he exercised his discretion wisely and advisedly or whether by law he was compelled to act as he did. But, as matter of fact, the Secretary of the Interior in refusing to follow the recommendation of his subordinates that the land in controversy be added to the town site of Mill Creek, did act wisely and advisedly and pursuant to the latest enactment of Congress relative to town sites, namely, the act of March 3, 1903 (32 Stats. at Large, 982-996). At the time that act was approved by the President, there had been laid out a number of town sites by the United States and a certain number of others were in course of consummation by the town site commissions. Meanwhile there had been enacted other provisions enabling private enterprises to lay out town sites, and the needs of commit-

tees were being provided for as occasion demanded by private real estate development. By the act of March 3, 1903, *supra*, Congress refused to further appropriate for expenses for town site work except a sum necessary to complete work already under way, expressly declaring this money should "be applied only to the expenses incident to the survey, platting and appraisement of town sites heretofore set aside and reserved from allotment," but that private enterprise might continue to create town sites.

Whether this act be regarded as mandatory or directory, as prohibiting the Secretary laying out new town sites or new additions to old town sites or as indicating national policy, the Secretary was right and proper in view of it and of all the facts as to the size of the town and its prospective growth, all of which were before him fully, in refusing to create new town site additions and in deciding the 40 acres in controvery should not be reserved and a new town site addition project embarked on by the government, but that the land should be thrown open to allotment, with the consequent right on the part of the allottee to plat and subdivide if so desiring.

Where a later act is a substitute for former acts the former are repealed. The whole issue or point is one of legislative intention.

Pana *vs.* Bowler, 107 U. S., 529.
D. C. *vs.* Hutton, 143 U. S., 18.
Tracy *vs.* Tuffly, 134 U. S., 206.

When later he in October, 1905, attempted a new town site segregation the act of 1904 had ordered town site work closed.

The learned counsel of plaintiff in error has attempted to split hairs over the Secretary's action and claim the

Secretary's letter of March, 1903, informing the Dawes Commission its recommendation to add the land in controversy with other land to the town site of Mill Creek was not agreed to, and that it was not deemed advisable to do so, was not a final decision. It was tantamount thereto. No particular form of words was needed to signify the land was not reserved from allotment (West *vs.* Hitchcock, 205 U. S., 80). Not being reserved it became "allotable lands." Thereafter it was so treated by the government and its officers and employees. Again the assertion is made that the Secretary did not approve the allotment. The assertion is correct as far as it goes, but it halts where it should have gone further. The fact will not be denied, and is not asserted in the pleadings, that the practice, regulations and custom of the department, and we insist also the law as laid down in the statutes, were for the Dawes Commission to issue allotment certificates wherever the party was enrolled and his allotment filing was not contested. The usual orderly course of administration was pursued in this case with the allotment certificate, and the petition so avers. The use of the phrase "but the allotment of the lands to petitioner by the Commissioner was never reported to the Secretary of the Interior for his approval, nor was such allotment ever approved by him" in the amended petition (R. 16) is not tantamount to an averment by plaintiff in error that the usual practice was to report to the Secretary allotments and allotment certificates, and that such usual practice was not followed in this case. The statement made in the pleadings is correct technically, but it might be misleading. A statement that the usual practice was to report allotments and allotment certificates would be false. It is a rule of pleading in mandamus that the

return or answer must be more than ordinarily specific. "The return is required to be more certain than the writ, a plea in bar or an answer in an ordinary case."—Ency. of Pl. and Prac., vol. 13, p. 718.

In his brief counsel for plaintiff in error has gone outside the record to attack the petitioner. The statements can be made only to prejudice the court. They are unwarranted and inaccurate. The land and buildings involved herein on the record before the Department of the Interior even now are worth less than ten thousand dollars. The tract in controversy years before allotment was the farm of petitioner. On it is her house and likewise an orchard and garden. Part of the land her husband sold in building lots to various persons, some of whom have built. Owing to delay in removal of her restrictions, and her consequent inability to make transfers, some of these parties apparently feared Mrs. Frost would not recognize her husband's agreements. These fears are unfounded. Mrs. Frost abides by all her husband's agreements. She is of record before the department as admitting he was her agent, and if she did not recognize parties who built under the husband's invitation, equity would compel her to do so. Most of the land is unoccupied. Part of it is occupied by parties who knew of her rights and her long residence on the tract and claim thereto thereby, and who for their own gain took their chances and calculated wrongly on administrative action gaining them cheap lots, and who, when their plans went awry, probably influenced parties with written agreements signed by the husband, and are responsible for the Secretary's ill-advised, arbitrary, and illegal action. They are squatters, and entitled to no sympathy. The present counsel offered a fair compro-

mise to the then Secretary of the Interior, agreed that its carrying out should be entrusted to his own officials, and that all those entitled to protection should have the same on fair, reasonable terms to be agreed on in advance of compromise. The proposition, although recommended by the Commissioner of Indian Affairs and the Indian Inspector, was, by the influence of local officers in the Territory, rejected. Counsel's request that the entire matter be referred to the law officers of the Interior Department was denied with scant ceremony, and thereupon the present proceeding was brought. In view of the brief of the plaintiff in error, admittedly going into matters outside the record, this simple statement of facts has been appended to the brief of the defendant in error.

Respectfully submitted,

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